Circular migration from the Eastern neighbourhood to the EU

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На моето семейство / To my family

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Zvezda Vankova,

3rd May 2018, Brussels

Outline

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List of Abbreviations

ACP states	African, Caribbean and Pacific Group of States
CARIM	Consortium for Applied Research on International Migration
CEE	Central and Eastern Europe
CIS	Commonwealth of Independent States
CJEU	Court of Justice of the European Union
CoE	Council of Europe
COMECON	Council for Mutual Economic Assistance
CRC	Convention on the Rights of the Child
DG Home	Directorate-General for Migration and Home Affairs, European Commission
EAB	Ethics Advisory Body
ECHR	European Convention on Human Rights
ECMW	European Convention on the Legal Status of Migrant Workers
ECtHR	European Court of Human Rights
EMN	European Migration Network
ETF	European Training Foundation
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
EURA-NET project	Transnational Migration in Transition: Transformative Characteristics of Temporary Mobility of People
GAM	Global Approach to Migration
GAMM	Global Approach to Migration and Mobility
GATS	General Agreement on Trade in Services
GCIM	Global Commission on International Migration
GFMD	Global Forum on Migration and Development
ICCPR	International Covenant on Civil and Political Rights

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMPD	International Centre for Migration Policy Development
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICT	Intra-corporate transfer/transferee
ILO	International Labour Organization
IOM	International Organization for Migration
IT	Information Technology
JHA	Justice and Home Affairs
MIDA	Migration and Development for Africa
MIEUX	MIgration EU eXpertise
MIPEX	Migrant Integration Policy Index
MoI	Ministry of Interior (and Administration)
MOU	Memorandum of Understanding
MPI	Migration Policy Institute
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
SAWP	Seasonal Agricultural Worker Program
TFEU	Treaty on the Functioning of the European Union
TFWP	Temporary Foreign Worker Program
TOKTEN	Transfer of Knowledge Through Expatriate Nationals
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
US/USA	United States (of America)
USSR	Union of Soviet Socialistic Republics (Soviet Union)
WB	World Bank
WHO	World Health Organisation

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CHAPTER 1:

Introduction[1]

1.1. Context

More than ten years ago, the European Commission adopted the term "circular migration"[2] for the first time and stated that it wanted to foster this type of migration in such a way so as to allow some degree of legal mobility back and forth between two countries.[3] Since its introduction at the EU level, this concept has attracted a large amount of political, policy and scholarly attention. The proponents of this type of migration claimed it as a "triple win solution" that could benefit all parties involved: the countries of destination and origin, as well as the migrant workers themselves.[4] For Member States, on the one hand, this form of migration would provide a solution that resonates with their reluctance to open up more channels for legal migration, permanent settlement and pathways to naturalisation, and it would also reduce any irregular overstaying. On the other hand, since circular migration is claimed to be of a temporary nature, states would be able to satisfy their labour market needs[5] and at the same time they would be able to disentangle themselves from the integration challenges that are associated with permanent migration.

Likewise, circular migration would supposedly benefit the countries of origin too. They could avail themselves of the social and economic development that this

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1 Parts of this chapter have already been published in Z. Vankova, 'EU Circular Migration Policies: Dead or Alive? Developing a Rights-based Benchmark Framework for Policy Assessment', *Journal of Immigration, Asylum and Nationality Law,* 30/4 (2016).

2 European Commission, Communication 'Migration and Development: Some concrete orientations', COM (2005) 390 final, Brussels, 1 September 2005, p. 7.

3 European Commission, 'Communication on circular migration and mobility partnerships between the European Union and third countries', COM (2007) 248 final, Brussels, 16 May 2007, p. 8.

4 See for instance European Commission, Communication 'Migration and Development: Some concrete orientations', COM (2005) 390 final, Brussels, p. 25. K. Newland, D. R. Mendoza, and A. Terrazas, 'Learning by Doing: Experiences of Circular Migration', Migration Policy Institute, Insight, September (2008), p. 2.

5 See for instance K. Zimmermann, 'Circular migration', *IZA World of Labor* 1(2014), p. 2.

migration is claimed to facilitate through a steady flow of remittances,[6] skills and knowledge transfers, as well as brain circulation, thus mitigating the negative effects of a brain drain.[7]

Last but not least, the proponents of circular migration claimed that it could potentially bring advantages for the migrant workers because, amongst other things, this type of migration is emerging as a natural preference for many migrants, especially when they are encouraged to circulate as a result of flexible policy frameworks.[8]

Many academic scholars have contested this new triple win "panacea" and its alleged positive effects for countries of origin and destination, as well as arguing that what one can see is a revival of the guest-working schemes that was associated with the circulation of "labour units" rather than free choice in the migration decision.[9] Indeed, the policy developments in recent years have illustrated that there is not much appetite for creating new rights-based schemes and obstacles to accessing long-term residence and family reunification are still not a reality for many migrant workers, especially those who are engaged in low-skilled sectors. Furthermore, as Wickramasekara has argued, the claim that circular migration is a "natural preference" for many migrants is unsubstantiated.[10] Even though crossing borders to live elsewhere is becoming a lifestyle of its own,[11] this trend

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6 See for instance G. Hugo, 'Circular Migration and Development: An Asia-Pacific Perspective', in O. Hofírek, R. Klvaňová, and M. Nekorjak (eds.), *Boundaries in Motion: Rethinking Contemporary Migration Events* (Brno: Centre for the Study of Democracy and Culture 2009); A. Constant and K. Zimmermann, 'Circular and repeat migration: Counts of exits and years away from the host country', *Population Research and Policy Review,* 30 (2011).

7 See for instance European Commission, Communication 'Migration and Development: Some concrete orientations', COM (2005) 390 final, Brussels, p. 7. Zimmermann, 'Circular migration', p. 3.

8 See G. Hugo, 'What We Know About Circular Migration and Enhanced Mobility', Policy Brief No7, Migration Policy Institute, (2013), p. 3; Newland, Mendoza, and Terrazas, 'Learning by Doing: Experiences of Circular Migration'.

9 See for example S. Castles and D. Ozkul, 'Circular Migration: Triple Win, or a New Label for Temporary Migration?', in G. Battistella (ed.), *Global and Asian Perspectives on International Migration* (Global Migration Issues; Switzerland Springer International Publishing, 2015); R. Skeldon, 'Going Round in Circles: Circular Migration, Poverty Alleviation and Marginality', *International Migration,* 50/3 (2012); P. Wickramasekara, 'Circular Migration: A Triple Win or a Dead End', Discussion Paper No 15, The Global Union Research Network, (2011); H. Schneider and A. Wiesbrock, 'Circular migration: A triple win situation? Wishful thinking or a serious option for suitable migration policy?', in D. Schiek, U. Liebert, and H. Schneider (eds.), *European Economic and Social Constitutionalism after the Treaty of Lisbon* (Cambridge: Cambridge University Press, 2011).

10 Wickramasekara, 'Circular Migration: A Triple Win or a Dead End', pp. 21-23.

11 T. Faist, M. Fauser, and E. Reisenauer, *Transnational migration* (Cambridge: Polity Press, 2013), p. 7.

very often concerns highly-skilled "global citizens", for whom special regimes are designed, and it does not necessary entail circularity.

Against the background of the current "refugee and migration crisis", it is imperative to assess what has been achieved ten years after the Commission promoted the facilitation of circular migration. Several organisations have argued that more legal channels to the EU must be made available[12] and some of them stress that stock needs to be taken of the pathways for legal mobility that are already in existence.[13] Does the facilitation of circular migration at the EU level have the potential to provide a durable legal pathway for migrants? And if yes, is this a rights-based solution that is beneficial for the migrant worker?

Much of the literature on circular migration within the context of the EU thus far has focused on conceptualising what is meant by the term[14] and discussing the critical issues that are related to this type of migration,[15] as well as analysing the existing patterns between the EU and its neighbours[16] rather than discussing the implementation of the EU's circular migration approach and its consequences for migrant workers.[17] Little is known about the ways in which the existing supranational and national structures and the normative frameworks they create influence

12 See for example G. Jackson, 'UN's François Crépeau on the refugee crisis: 'Instead of resisting migration, let's organise it', *The Guardian*, 22 April 2015, retrieved at https://www.theguardian.com/world/2015/apr/22/uns-francois-crepeau-on-the-refugee-crisis-instead-of-resisting-migration-lets-organise-it?CMP=share_btn_tw (accessed 16 August 2016).

13 Such as the Migration Policy Institute in E. Collett, P. Clewett, and S. Fratzke, 'No Way Out? Making Additional Migration Channels Work for Refugees' (Migration Policy Institute Europe, 2016).

14 The Euro-Mediterranean Consortium for Applied Research on International Migration (CARIM), which was managed by the Robert Schuman Centre for Advanced Studies of the European University Institute, Italy produced research that examined the demographic, legal and socio-political aspects of circular migration in the Euro-Mediterranean context for the European Commission. See for instance F. Fargues, 'Circular Migration: Is it relevant for the south and east of the Mediterranean?', CARIM - AS, 2008/40, (2008). Moreover, the CARIM East project covered explanatory notes that examined the demographic, legal and socio-political aspects of circular migration between Eastern Europe and the European Union and within the post-Soviet space retrieved at: http://www.carim-east.eu/database/legal-module/?ls=4&ind=exnocm&lang= last (accessed 25 September 2017).

15 See for example S. Castles, 'Guestworkers in Europe: A resurrection?', *International Migration Review,* 40/4 (2006); Castles and Ozkul, 'Circular Migration: Triple Win, or a New Label for Temporary Migration?'; S. Vertovec, 'Circular Migration: The Way Forward in Global Policy?', *International Migration Institute Working Papers,* Paper 4 (2007); F. Pastore, 'Circular Migration', Background note for the Meeting of Experts on Legal Migration, Rabat, 3-4 March 2008, (2008); Skeldon, 'Going Round in Circles: Circular Migration, Poverty Alleviation and Marginality'.

16 A. Triandafyllidou (ed.), *Circular migration between Europe and its neighbourhood: choice or necessity?* (Oxford: Oxford University Press, 2013b).

17 See for example S. Carrera and R. Hernández i Sagrera, 'The Externalisation of the EU's Labour immigration policy. Towards mobility or insecurity partnerships?', CEPS Working document no. 321, (2009). S. Angenendt, 'Circular Migration: A Sustainable Concept for Migration Policy?', SWP Comments 11, Stiftung Wissenschaft and Politik, Berlin, (2007).

the possibility for migrants to circulate. As Vertovec has stressed, the study of transnational migration would benefit from examining the ways in which transnational social structures and practices have emerged in the light of opportunity structures – such as visa, residency, citizenship, pension and health care provisions – in both the sending and receiving states and how they influence migrants' own desires and strategies to conduct their transnational lives.[18]

The aim of this study is to contribute to filling this gap by assessing the implementation of EU policies and legal instruments that are designed to foster circular migration and additionally how they affect migrant workers' rights in the context of circularity. The study focuses geographically on the Eastern neighbourhood, which comprises countries in Central and Eastern Europe (CEE) attracting migrant workers from the former Soviet Union republics. This region is an interesting case for research because it is understudied both in terms of issues related to legislation and policy of these new countries of immigration, as well as in terms of implementation of EU's circular migration at the national level. Furthermore, the CEE comprises both EU and non-EU countries and is characterised by an increasing cross-border migration after the latest EU enlargement.

1.2. Definitions, patterns of circular migration and differences with other types of migration

In order to assess circular migration policies, it is important to first define what is meant by this term. In order to understand the meaning of circular migration and what it entails, the obvious choice is to first clarify its components – "circulation" and "migration". Migration is understood as "crossing the boundary of a political or administrative unit for a certain minimum period".[19] The academic literature distinguishes between two main types of migration - international and internal - which is often attributed to "administrative convenience rather than of any substantive difference in the nature of the flows".[20] While internal migration occurs between two administrative units (district, province or region) within the frontiers of one country, international migration is concerned with the crossing of

18 S. Vertovec, 'Migration and other modes of Transnationalism: Towards Conceptual Trans-fertilization', *International Migration Review,* 37 (2003), pp. 653-654.

19 S. Castles, 'International Migration at the Beginining of the Twenty-First Century: Global Trends and Issues', *International Social Science Journal,* 52/165 (2000), p. 269.

20 See R. Skeldon, *Migration and Development: A Global Perspective* (Harlow, Essex: Addison Wesley Longman, 1997), pp. 9-10.

state borders.[21] In order to be considered as migration, the crossing of a frontier must lead to residence of a certain period of time in a country, and that country must be different from the country of origin.[22] Otherwise this movement would be considered as cross-border mobility for the purposes of tourism, education or business activities. Even though circular migration can be both internal and international, the focus of this study is on circular migration that involves two main elements *border crossing* and *shorter or longer periods of residence in a country of destination***.**

According to the Oxford English Dictionary, when used in the context of movement or journey, the term "circular" refers to "starting and finishing at the same place and often following roughly the circumference of an imaginary circle".[23] This means that circular movement implies the notion of *return* to the same place in order to close the "imaginary circle". Zelynski defines circulation in the context of migration as "a great variety of movements usually short term, repetitive and cyclical in nature but all having in common the lack of any declared intention of a permanent or long lasting change of residence".[24] Hence, along with *return*, the notion of circulation is also characterised by *repetition*, *recurrence* and *temporality.*

To sum up, circular migration entails repetitive, recurrent and temporary cross-border movement for short or long periods of residence in a country of destination and then a return to the country of origin. All of these features outline a spontaneous pattern of mobility that was referred to for the first time as "circular migration" in the academic literature on urbanisation, rural development and internal migration in developing countries at the end of the 1960s and 1970s.[25] The term was essentially defined as "the process of leaving and returning to one's place of origin", describing seasonal or periodic movements, as well as migration as a survival strategy or a life-cycle-process.[26] Subsequently, academics from different branches of science have started to use this term, developing for example the New

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21 Castles, 'International Migration at the Beginining of the Twenty-First Century: Global Trends and Issues', p. 269.

22 Ibid.

23 Online Oxford Dictionary, retrieved at: http://www.oxforddictionaries.com/definition/english/circular (accessed 12 April 2017).

24 W. Zelinsky, 'The Hypothesis of the Mobility Transition', *Geographical Review,* 61/2 (1971), pp. 225-226.

25 K. Newland, 'Circular Migration and Human Development', UNDP Human Development Reports, 42, (2009), p. 5. See also Skeldon, 'Going Round in Circles: Circular Migration, Poverty Alleviation and Marginality', p. 44.

26 Newland, 'Circular Migration and Human Development', p. 5.

Economics of Labour Migration[27] and Migrant Transnationalism,[28] whilst international organisations and policy-makers became interested in this concept roughly a decade ago.[29]

The introduction of this concept into the international policy-making discourse marked a shift in the use and understanding of circular migration. The term that describes a pattern of spontaneous movement was altered by a new perception of circular migration as a potential migration policy tool.[30] Since the aim of migration policies is to affect the behaviour of potential migrants in an intended direction,[31] the new policy tool was expected to make this intended direction circular. However, this new normative approach to circular migration failed to arrive at a common understanding of the content of the term and thus, at the time of writing, there is no definition of circular migration that is universally accepted.[32]

A common feature of all the definitions of circular migration that have been developed at the international and at the EU level is that they are all rather vague, open to interpretation and focus on different aspects of circular migration, which in turn leads to different understandings of the term. As was pointed out by Skeldon, circular migration "is a direct function of the definitions applied".[33] Moreover, this "definitional ambiguity" creates opportunities for different policy actors to impose their preferred meaning of the term as a policy solution to a variety of perceived migration problems, such as "the political headache for Member States of continued demand for migrant labour coupled with significant anti-immigration sentiment".[34]

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27 For more information, see S. Castles, H. D. Haas, and M. J. Miller, *The Age of Migration. International Population Movements in the Modern World* (Fifth edn.: Palgrave Macmillan, 2014), pp. 38-39.

28 N. G. Glick Schiller, L. Basch, and C. Blanc-Szanton, 'Transnationalism: A New Analytic Framework for Understanding Migration', *Annals of the New York Academy of Sciences* 645 (1992). See also A. Portes, L. E. Guarnizo, and P. Landolt, 'The study of transnationalism: pitfalls and promise of an emergent research field', *Ethnic and Racial Studies* 22 (1999).

29 For more information see Chapter 4.

30 Newland, 'Circular Migration and Human Development', p. 6.

31 M. Czaika and H. De Haas, 'The Effectiveness of Immigration Policies', *Population and Development Review,* 39/3 (2013), p. 487.

32 ICMPD, 'Prague Process Handbook on Managing Labour and Circular Migration', (2014), p. 40. Castles and Ozkul, 'Circular Migration: Triple Win, or a New Label for Temporary Migration?', p. 28. A. Geddes, 'Temporary and circular migration in the construction of European migration governance', *Cambridge Review of International Affairs,* 28/4 (2015), p. 572.

33 Skeldon, 'Going Round in Circles: Circular Migration, Poverty Alleviation and Marginality', p. 47.

34 Geddes, 'Temporary and circular migration in the construction of European migration governance', pp. 584-585.

When the term "circular migration" first entered the global migration-development debate in 2005, it was used interchangeably with the notions of temporary migration and return, and it was also used as an umbrella term that encompassed both aspects.[35] It was not until the first Global Forum on Migration and Development in 2007 that a working definition was provided at the international level as follows: "Circular Migration is the fluid movement of people between countries, including temporary or more permanent movement which, when it occurs voluntarily and is linked to the labour needs of countries of origin and destination, can be beneficial to all involved".[36] This definition, developed by the Migration Policy Institute (MPI), recognised that circular migration can take different forms and that it could be either temporary or permanent. It also included an aspirational policy element related to "mutual benefit and voluntariness".[37]

In 2005, the European Commission initially defined circular migration rather descriptively as a spontaneous pattern: "(…) migration, in which migrants tend to go back and forth between the source country and the destination country (…)".[38] The 2007 Commission Communication conceptualised it further as "a form of migration that is managed in a way allowing some degree of mobility back and forth between two countries", which marked a shift in the Commission's approach towards the policy idea of circular migration management. One of the interviewees in this study, who participated in the introduction of this concept in the EU's policy agenda, shared that the concept was deliberately left broad so as to capture a wider policy context and instruments based on different Treaty articles.[39] The term "mobility" was used in order to forge an explicit link to the visa policy but also to denote the circular "back and forth" movement, as well as "to bring in the concept of dynamics".[40] Another interviewed official stressed that different stakeholders would associate circular migration with something that they were familiar with, such as for example, guest working schemes and seasonal work.[41]

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35 See Chapter 4 for more detail in this regard.
36 K. Newland and D. Agunias, 'How can Circular Migration and Sustainable Return Serve as Development Tools?', Background paper for Roundtable 1.4, GFMD, Brussels (2007), p. 4.
37 See Newland, 'Circular Migration and Human Development', p. 7.
38 European Commission Communication, Migration and Development: Some concrete orientations, COM (2005) 390 final, Brussels, 1 September 2005, Annex 5, p. 25.
39 Interview # 29 with European Commission official, Brussels, May 2017, Annex I.
40 Interview # 29 with European Commission official, Brussels, May 2017, Annex I.
41 Interview # 11 with European Commission official, Belgium, May 2013, Annex I.

An interviewed Council official mentioned that, according to his personal understanding, circular migration referred to a scheme of temporary migration.[42] It was mostly used as a tool to achieve "a status of protected people", so that migrants could keep their work permits and use them again when they go back to the country of destination.[43] Circular migration was also seen as an incentive to avoid "illegality". However, for the respondent, the biggest question was whether one could control circular migration patterns, which by their very nature were spontaneous acts. He associated managed circular migration with the creation of schemes, which seemed complicated and beset with problems.[44] A representative of an international organisation that was interviewed shared the view that the EU policy discussions on circular migration, indeed, were focused on the establishment of temporary migration schemes.[45]

A European Commission official confirmed that "the official school is that we want to have well-managed migration and therefore when we talk about circular migration, we have to put in a management scheme".[46] On a personal level, however, he believed in the model that facilitated spontaneous circular migration, even though this model could not be promoted among the Member States because "spontaneous" sounded like "uncontrolled".[47] According to the official: "(...) for this reason, people have preference for a more organised system, even though in reality, it hardly happens".[48]

In 2010 the European Migration Network was commissioned to carry out a study on circular migration.[49] Instead of applying the definition that was promulgated by the Commission, it proposed its own definition as follows: "a repetition of legal migration by the same person between two or more countries".[50] This definition

42 Interview # 8 with EU Council official, Brussels, February 2013, Annex I.
43 Interview # 8 with EU Council official, Brussels, February 2013, Annex I.
44 Interview # 8 with EU Council official, Brussels, February 2013, Annex I.
45 Interview # 28 with representative of international organisation, Austria, March 2017, Annex I.
46 Interview # 9 with European Commission official, Belgium, March 2013, Annex I.
47 Interview # 9 with European Commission official, Belgium, March 2013, Annex I.
48 Interview # 9 with European Commission official, Belgium, March 2013 Annex I.
49 This study's aim was "to illustrate different policy preferences and approaches to temporary and circular migration, and to provide evidence of their characteristics, as well as to identify lessons learned, best practices and possible policy options, which could be further explored at national and EU political levels". Thus, the EMN study also responded to the request from the Council, through its Council Conclusions and the Stockholm Programme, regarding further exploration and development of circular migration as an integral part of EU migration policy". In European Migration Network, 'Temporary and Circular Migration: empirical evidence, current policy practice and future options in EU Member States. Synthesis Report', (2011), p. 1.
50 Ibid., p.14.

stressed that circular migration takes place through legal channels and that circularity may occur between more than two countries.

Even though circular migration policies are regulated at the national level, the Member States' legislative and policy documents are not a source of definitions that provide more clarity in relation to the concept of circular migration. The reason is that only some of the Member States have a legal or a policy definition of circular migration.[51] Moreover, at the national level there is typically no legal status or policy that explicitly refers to the term circular migration. Hence, this type of migration is regulated through the general national migration legislation.[52]

Hitherto, academics and researchers have been unable to arrive at one generally accepted definition of the notion of circular migration. Skeldon, for example, argues that circular migration is a subset of return and temporary migration, where the migrant "engages in a regular and repetitive series of outward and return movements between an origin and a destination or destinations", and is "free" to return at any time.[53] As in the policy definitions provided by the European Commission and the European Migration Network, the author wishes to emphasise that circular migration is repetitive, regular and involves more than one return. However, his key point is that circular migration occurs at its best, when individuals are entitled to free movement across international boundaries, and when it is in line with the idea of "voluntariness" that has been developed by Newland et al., and which was presented before the Global Forum on Migration and Development in 2007.[54]

Furthermore, according to Skeldon, it is contradictory to talk about managing circular migration because this will turn it into a temporary programme of migration.[55] In other words, facilitating spontaneous circular migration that already occurs is a more successful policy option than managing migration by placing restrictions on labour and human rights, the length of stay or change of employer. As was demonstrated above, this is a very distinctive feature in the definitions that have been given by some scholars and policy makers.[56] Cassarino is equally critical in this regard, arguing that circular migration programs aim to manage

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51 Ibid., p.22.
52 ICMPD, 'Prague Process Handbook on Managing Labour and Circular Migration', p. 50.
53 Skeldon, 'Going Round in Circles: Circular Migration, Poverty Alleviation and Marginality', p. 47.
54 See Newland, 'Circular Migration and Human Development', p. 7.
55 Skeldon, 'Going Round in Circles: Circular Migration, Poverty Alleviation and Marginality', p. 53.
56 See also A. Triandafyllidou, 'Circular Migration: Introductory Remarks', in A. Triandafyllidou (ed.), *Circular migration between Europe and its neighbourhood: choice or necessity?* (Oxford: Oxford University Press, 2013a), p.5.

international migration on the basis of the past temporary labour migrant schemes and which are linked to "security-driven safeguards".[57] These authors believe that the concept of managed circular migration does not differ greatly from the old guest-working models that were developed after the World War II, which emphasised restrictions and security in order to manage migration.

One of the interviewed academics stressed that this was a concept "especially established to look nice on paper: it allows the policy makers to show the voters that it is something that it is manageable, so it is a tool.[58] If you have a tool, it means that you can manage a phenomenon". According to her, there were Member States, such as Germany, Austria, the Netherlands and France, where one could not "tell the voters that you are going to have temporary migration scheme, but when they were given this beautiful package of circular migration, they adopted it and moved it up on the European agenda".[59] In addition, according to this respondent, it was also developed to attract funding from the donors: "the donors would never give money for temporary migration schemes but it is a different thing for circular migration. In the end, it is exactly the same".[60]

Hugo, who was among one of the first scholars to start using the term, puts an emphasis on the elements of repetition and regularity in his definition: "circular migration refers to repeated migration experiences between an origin and destination involving more than one migration and return".[61] He argues that circular migration is best understood as an occurring and spontaneous migration pattern that should be facilitated and encouraged through policy measures by both destination countries and countries of origin. Moreover, according to him, where permanent settlement occurred, it would not hinder circulation in the long term.[62]

Most of the authors have emphasised the temporary and economic characteristics of circular migration along with the element of repetition.[63] For example, Wickramasekara defines it as "repeated migration experiences involving more than

57 J. P. Cassarino, 'The Drive for Securitized Temporariness', ibid, p. 23.
58 Interview # 12 with academic, Italy, May 2013, Annex I.
59 Interview # 12 with academic, Italy, May 2013, Annex I.
60 Interview # 12 with academic, Italy, May 2013, Annex I.
61 Hugo, 'What We Know About Circular Migration and Enhanced Mobility', p. 2.
62 Ibid.
63 See also Newland, Mendoza, and Terrazas, 'Learning by Doing: Experiences of Circular Migration', J. P. Cassarino, 'Patterns of Circular Migration in the Euro-Mediterranean Area. Implications for Policy-Making', CARIM Analytic and Synthetic Notes 2008/29, Circular Migration Series, Political and Social Module, (2008).

one emigration and return"[64] and Vertovec as "regular, repeated temporary labour migration".[65] Fargues takes a rather normative approach and underlined the essential ingredients that are needed for a circular migration policy. According to him, circular migration is characterised as "temporary, renewable, circulatory, legal, respectful of the migrants right, and managed in such way as to optimise labour markets at both ends, in sending and receiving countries".[66] As to the notion of "circulatory", the author means freedom of movement between countries of origin and destination, as per the definitions given by Skeldon and Newland et al. Fargues also emphasises the importance of migrants' rights and suggested that another important aspect of a circular migration policy could be the enhancement of skills and skill transfers.[67]

Even though there is no one single and uncontested definition of circular migration, this study outlines four common elements that are derived from the definitions that have been provided by academia, international organisations and policy-makers:

1. It concerns mainly regular (legal) cross-border movement, occurring trough legal channels.[68] It can be facilitated through policy measures or adjustments that foster spontaneous patterns of already occurring migration or managed through specially designed programmes and schemes.
2. It occurs mainly for economic purposes; therefore it involves labour.
3. It is repeated, whereby migrants recurrently move between their countries of origin and destination. Furthermore, it involves a certain degree of voluntarism and "free" movement of circular migrants to their countries of origin and/or destination.
4. It is temporary in nature, but it is not limited solely to temporary stays and it does not exclude the circular migration of permanently settled migrants.

On the basis of these characteristics, this study proposes the following working definition of circular migration: circular migration is a form of international mobility that involves legal temporary migration of economically active third

64 Wickramasekara, 'Circular Migration: A Triple Win or a Dead End', p. 9.
65 Vertovec, 'Circular Migration: The Way Forward in Global Policy?', p. 3.
66 Fargues, 'Circular Migration: Is it relevant for the south and east of the Mediterranean?', p. 11.
67 Ibid., p. 2.
68 Even though circular migration can also have an irregular character, most of the authors put an emphasis on its legal character. Sometimes the crossing of a border can be regular but the work itself may be irregular – e.g., Ukrainian circular migrants working on a tourist visa in the domestic sector. See also Triandafyllidou, 'Circular Migration: Introductory Remarks', p. 13.

country nationals, moving repeatedly between their countries of destination and their countries of origin.

Typologies of patterns of circular migration naturally vary depending on each author's approach to defining circular migration. Newland et al., for instance, outlines three patterns of circular migration, differentiating between the character of the movement and the level of the skills of the migrant – seasonal; non-seasonal and low-wage and mobility of professionals, knowledge workers and transnational entrepreneurs.[69] In his research on circular migration in the Euro-Mediterranean area, Cassarino provides an alternative typology of circular migration patterns, which are shaped by the migrant's mobility strategy (migrant's agency), as well as by changing circumstances and structural factors such as state migration and border policies.[70] According to his typology, patterns of circular migration can be hindered, embedded and regulated.

Both typologies capture the intrinsic characteristics of circular migration, which can only demonstrate the variety of circular movements if they are examined together. Patterns of circular migration can be differentiated on the basis of the seasonality (or not) of the movement, the skill level of the migrants and whether the circular migration pattern is regulated or embedded (non-regulated). The only category that does not fit within this joint model is the hindered pattern, which as Wickramasekara stresses, is not a separate category.[71] It actually does not describe a different type of movement, but rather it presents the factors that could drive circular movement to an end, which are applicable to both embedded and regulated types. Only by joining the two typologies can one arrive at a variety of circular patterns, which in turn gives a better picture of the diversity that is redolent of circular migration.

Nevertheless, as Skeldon underlines, "the identification of a constant, clearly identifiable form of migration that can be called 'circular' is problematic", especially across borders.[72] The author believes that circular movements are prone to change their duration and composition over time.[73] Therefore, another fact that poses additional challenges to the conceptualisation of circular migration is the difficulty of separating it from other forms of migration, such as temporary

69 Newland, Mendoza, and Terrazas, 'Learning by Doing: Experiences of Circular Migration', p. 3.
70 Cassarino, 'Patterns of Circular Migration in the Euro-Mediterranean Area. Implications for Policy-Making', p. 2.
71 Wickramasekara, 'Circular Migration: A Triple Win or a Dead End', p. 10.
72 Skeldon, 'Going Round in Circles: Circular Migration, Poverty Alleviation and Marginality', p. 44.
73 Ibid., p. 55.

and return migration. Furthermore, "leakage", as Skeldon refers to permanent settlement in the country of destination, is an inherent characteristic of circular migration.[74] Despite these challenges, and for the sake of clarity, it is important to attempt to distinguish between the typical features of circular migration and other types of migration and, furthermore, to demonstrate how they relate to each other.

Circular vs. permanent migration

Permanent migration involves migration to another country for long-term or permanent settlement. This type of migration, however, does not exclude circularity. Circular migration can "leak" into permanent migration and restart again at some point, since there are long-term or permanently settled migrants whom engage in circularity to their county of destination. Actually, more and more scholars consider that in the age of globalisation, which provides for so much accessible communication and transport, this naturally means that "all migration is to some extent circular".[75]

Circular vs. temporary migration

The terms temporary and circular migration are frequently used interchangeably[76] in policy circles, therefore it is important to make salient the differences between them. The main distinction between these two types of migration is that temporary migration "involves a one-time only temporary stay and eventual return which closes the migration cycle"[77] whereas circular migration involves recurrent temporary movements after the initial return. In line with that premise, Newland et al. argue that "circular migration is distinct from temporary migration in that circular migration denotes a migrant's continuous engagement in both home and adopted countries".[78] Therefore, circular migration is also seen as being closely connected to transnationalism, featuring migration, as well as return to the country of origin.[79]

Furthermore, both terms relate to temporary movement and stay, which raises the following question: how long is temporary? According to the working defi-

74 Ibid., p. 53.
75 Pastore, 'Circular Migration', p. 3.
76 Or as Triandafyllidou notes in a "slash fashion "temporary/circular". In Triandafyllidou, 'Circular Migration: Introductory Remarks', p. 4.
77 European Migration Network, 'Temporary and Circular Migration: empirical evidence, current policy practice and future options in EU Member States. Synthesis Report', p. 21.
78 Newland, Mendoza, and Terrazas, 'Learning by Doing: Experiences of Circular Migration', p. 2.
79 Triandafyllidou, 'Circular Migration: Introductory Remarks', p. 5. See also Vertovec, 'Circular Migration: The Way Forward in Global Policy?', pp. 2-3.

nition that has been given by the EURA-NET project that focuses on the impact of temporary migration, this type of movement can last between three months and up to five years.[80] The variations in the range of "human mobility experiences" within this spectrum depend on the different categories of migrants.[81] For instance, persons who stay in the EU for a period shorter than three months are involved in short-term circularity, whereas at the other end of the spectrum – migrants spending more than five years outside their home country – the migrants are considered to be long-term residents, settled more permanently abroad.[82] Hence, temporary migration excludes any permanent stays.

In contrast to those temporary migration stays, which do not last for more than five years, the circular migration cycle has no formal beginning or end. It could begin under three months in the case of seasonal migration, continue after five-year long periods, when a third country national qualifies for a long-term residence status, and last even up until the person becomes eligible for naturalisation and is granted citizenship. Therefore, circular migration can encompass both temporary and also more long-term stays. The distinctive feature is that the circular migrants spend significant periods of their lives between both their countries of origin and destination.[83]

Circular vs. return migration

Usually the term "return migration" refers to a one-off movement back to the country of origin. Nevertheless, as was the case with the example of permanent migration, return does not exclude circularity. There are migrants who live abroad and permanently return back to their countries of origin, but there are also migrants who return temporarily and continue to circulate. Thus, the main difference with the circular migration is that one-off return migration closes the migratory cycle and circular migration "implies more than just a single out-and-return movement". [84]

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80 S. Carrera, K. Eisele, and E. Guild, 'European and International Perspectives and Standards on temporary Migration', in P. Pitkanen and S. Carrera (eds.), *Transnational Migration in Transition: State of the Art Report on Temporary Migration* (Collected Working papers from the EURA-NET project, University of Tampere, 2014), p. 18.

81 M. Aksakal and K. Schmidt-Verkerk, 'Conceptual Framework on Temporary Migration', Report on Conceptual Clarifications for the EURA-NET Project, (2015), p. 5.

82 Ibid.

83 Hugo, 'What We Know About Circular Migration and Enhanced Mobility', p. 2.

84 Skeldon, 'Going Round in Circles: Circular Migration, Poverty Alleviation and Marginality', p. 46.

Circular vs. labour migration

Circular migration occurs primarily for economic reasons, such as higher wages, economic survival, better working conditions, and it can thus be considered as being predominantly labour migration.[85] As was already mentioned above, circular migrants can have different levels of skills and thus work in a variety of different sectors. Moreover, it is important to also draw a distinction between cross-border commuting as another type of economic circulation that is not considered to be circular migration. Commuting involves a return to the country of origin within the same day or within the working week and therefore it does not involve long stays abroad.

Circular vs. other types of migration that are circular in nature

It is important to distinguish circular migration form shuttle and pendular[86] migration, which are also referred to as incomplete migration.[87] These types of migration emerged in the post-1989 period between the CEE countries. They possess a "quasi-migratory character" and denote the movement of "incomplete migrants", which do not last for more than three months, after which they then return back home. They usually enter as "false tourists" on a short-term visa and informally engage in petty trade commerce or interregional trading.[88] For example, this was a strategy that was predominantly used by Ukrainians in Poland.[89] However, the main difference with circular migration is that this type of movement falls within the ambit of short-term mobility and it involves migrants that work irregularly on the basis of a tourist visa.

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85 Triandafyllidou, 'Circular Migration: Introductory Remarks', p. 12.

86 This was first introduced by M. Morokvasic, 'Une migration pendulaire: les Polonais en Allemagne', *Hommes et Migrations,* 1155 (1992), pp. 31-37. See also K. Iglicka, 'Mechanisms of migration from Poland before and during the transitional period', *Journal of Ethnic and Migration Studies,* 26 (2000), pp. 61 -73.

87 M. Okólski, 'The effects of political and economic transition on international migration in Central and Eastern Europe', in J. E. Taylor and D. S. Massey (eds.), *International Migration. Prospects and Policies in a Global Market* (Oxford: Oxford University Press, 2004), p. 44.; see also P. Kaczmarczyk and M. Okólski, 'International Migration in Current and Eastern Europe – Current and Future Trends', Report for the United Nations Expert Group meeting on International Migration and development, UN/POP/PD/2005/12, (2005).

88 Okólski, 'The effects of political and economic transition on international migration in Central and Eastern Europe', p. 44. This strategy was also used in the domestic sector. See for instance, S. Marchetti, 'Dreaming Circularity? Eastern European Women and Job Sharing in Paid Home Care', *Journal of Immigrant and Refugee Studies,* 11/4 (2013), pp. 347-363.

89 See for instance K. Iglicka and K. Gmaj, 'Circular Migration Patterns Migration between Ukraine and Poland', METOIKOS Project, European University Institute, Robert Schuman Centre for Advanced Studies, (2010). See also Chapter 6 of this dissertation.

Circular migration vs. mobility

Traditionally the term "mobility" in the EU context was reserved for free movement of persons. After 2006, however, with the publication of the Commission Communication "Global Approach to Migration one year on",[90] the term "mobility" has started to be used also in the context of the external dimension of the EU's migration policy, denoting cross-border mobility. As Mananshivili stresses "the boundaries of this concept have not been demarcated yet, and accordingly, its precise legal definition is so far absent at the EU level".[91] Since this is an implementation study, the usage of both terms in the context of this dissertation follows the EU's usage.

Despite the conceptual challenges, this section of the study has outlined some of the key characteristics of circular migration that have formed the basis of a working definition: it is legal labour migration occurring through legal channels; it is repeated migration, involving more than one outward movement and return and it is temporary migration encompassing both temporary and long-term stays. As a next step, these features will be used to derive the policy issues that need to be addressed with regard to circular migration.

1.3. Policy issues at stake with circular migration

The previous section of this chapter examined the definition of circular migration in order to understand its content and its characteristics. Since the official discourse at the EU level is to foster this type of migration, the next question that arises concerns the key policy areas that must be addressed. Therefore, this section links the outlined conceptual elements of the working definition with the policy issues that are generally at stake with circular migration between countries of origin and destination.

In order to create a list of the policy issues that circular migration entails, one must first identify the policy areas that influence migration processes. As Haas and Czaika note, the role that states play in the migration processes, through for example labour market, foreign and welfare policies, has a much larger impact

90 See European Commission, Communication on the Global Approach to Migration one year on: Towards a comprehensive European migration policy, COM (2006) 735 final, Brussels, 20 November 2006.

91 Neither relevant EU legal acts nor the EMN glossary entail the explanation of what might be meant under Mobility. In S. Mananshvili, "What is EU's understanding of Mobility?" (unpublished note).

than the effect of solely migration-focused policies.[92] Therefore, this dissertation applies an understanding of migration policies that encompasses "rules (laws, regulations, and measures) that national states define and implement with the objective of affecting the volume, origin, direction, and internal composition of immigration flows".[93]

The previous section demonstrated that one of the characteristics of circular migration, as it is understood in this study, is that it is regular migration that occurs through legal channels across international borders. Firstly, as with every type of legal migration, circular migration involves a border crossing and a period of stay in a country of destination. In policy terms this means that migrants must have been authorised to enter the country of destination and reside therein. Hence, the two policy areas that need to be addressed firstly are the entry and residence conditions that are usually regulated through the countries' migration policies. Secondly, circular migration usually involves economically active migrants. Thus it possesses the features of labour migration that are usually regulated by the migration and the labour market policies of the destination countries. For the circular migrants, this means that they need to have permission to work in the country of destination.

For example, one of the obstacles that migrants typically face is that very often the initial work permits can tie them to a specific employer, sector and region for the duration of the first work permit or a longer period, during which they are not permitted to alter any of the stipulations. This can pose two types of obstacles for circular migrants. If they lose their job (e.g., a project implementation phase is postponed, seasonal work ends unexpectedly, owner goes bankrupt, etc.), migrants may be inclined to either continue working irregularly in the host country or leave for their home country earlier than their work permits anticipated, which in turn can lead to a financial loss for them. Moreover, the impossibility to change employment and sector can increase the risk of migrant workers being exploited and abused.

Thirdly, circular migration involves repeated and temporary movement. In policy terms, this means that countries create rules to make the direction of this type of migration circular, by allowing numerous returns to the country of origin and re-entry into the country of destination (for example, by not enacting obstacles to return or by counting each separate stay for the purposes of acquiring a permanent

92 Czaika and De Haas, 'The Effectiveness of Immigration Policies', p. 489.
93 ibid.

status or for the purposes of naturalisation). However, there are circular migration programmes that mainly target low-skilled workers that in general oblige migrants to leave the territory after their work permit expires and that restrict the possibility for migrants to apply for permanent status by excluding their permits from those which allow for an accumulation of residence rights towards a path to permanent settlement. Therefore, the issues surrounding return, re-entry and temporary periods of residence in two countries must also be considered in this analysis.

This brings the focus of this section to another policy issue. Circular migrants live transnational lives between their countries of origin and destination. This means that they contribute to the social security, pension and health systems of two countries during different periods of stay as part of their circular movement cycle. This raises the question of what happens with the accumulated contributions during the circulation period and after migrants decide to settle. Thus, fourthly, another policy issue at stake with this type of migration is the "circulation" of social security and health contributions. In order to foster circular migration, migrants need to be able to export, at least, the different types of pensions, unemployment, family benefits and benefits related to accidents. However, very often migrants (and their family members) cannot use all of the social benefits from the outset and in order to gain full access thereto they need to fulfill certain qualifying periods. Furthermore, even when they have contributed to the social security system in their country of origin, after they move to the destination country and due to their absence, they might gradually lose some or all entitlements to benefits in their country of origin.

The policy issues related to entry and re-entry conditions, work permits and residence status in two countries, as well as the "circulation" of social, pension and health contributions are essential policy elements, without which migrants would not be *able* to circulate in a way that is beneficial for them. However, there are other issues at stake when one discusses circularity, without which migrants might not be *willing* to engage in circular migration. One of these issues is the possibility for circular migrants to bring their family members with them during their periods of stay in the country of destination. Another issue at stake is the recognition of qualifications, which migrants gain, enrich and transfer while circulating between the two countries. These two aspects are regulated as part of the integration and migration policies in the country of destination, and as part of the education policies in the country of origin and they are considered in the analysis contained in this section.

To sum up, this section has focused on the key policy issues that must be addressed if circular migration is to be facilitated, by distinguishing between two types of policy areas: essential ones that enable migrants to circulate and secondary ones that can influence the willingness of migrants to engage in circular migration. It is impossible to create an exhaustive list in relation to the policy issues that fall within the second category. For instance, there are numerous policy areas concerning, generally, the integration of circular migrants in the country of destination, such as education, the status of children left behind in the country of destination or origin, anti-discrimination and political participation. Therefore, the author of this study has chosen to focus only on two aspects: family reunification and the recognition of qualifications.

The reason for this choice is that both policy areas are illustrative of the diversity of issues that this type of migration covers. For instance, family reunification might not be a problem for seasonal workers who are circulating for a period of three months. However, workers who take up employment for a year or more might change their migration decision if they are unable to bring their families along with them. Furthermore, it is important to look specifically at this policy because the options for family reunification are usually very limited or are not allowed in the context of time-bound labour migration schemes.[94] In addition, the recognition of qualifications is a preferred choice because proponents of circular migration claim that it enables a skill transfer back to the countries of origin, which in turn supports development. Nonetheless, some evaluations of circular migration schemes stress that there are cases when migrants return home and their new skills cannot be recognised or are not needed.[95] Therefore, this policy area is an important case for further research.

1.4. Research questions and spectrum of migrant categories covered by this study

Having regard to the presented definition of circular migration and the policy issues at stake with this type of migration, this dissertation discusses the formulation of the legal and policy instruments of the EU migration policy that aim to foster circular migration or which incorporate elements of circular migration

94 See Chapter 2 for more details.

95 K. Hooper and M. Sumption, 'Reaching a "Fair" Deal on Talent. Emigration, Circulation and Human Capital in Countries of Origin', Migration Policy Institute (2016), pp. 20-21. According to a 2013 study on US-Mexico return migration that was quoted in this report, only 28% of the returnees were using skills that they gained in the US in their current employment in Mexico.

(referred to hereinafter as the EU's circular migration approach) as well as their implementation at the national level in CEE. It focuses on the rights of migrant workers in six policy areas, namely entry and re-entry conditions, work permit and residence status, social security coordination, entry and residence conditions for family members and recognition of qualifications in order to assess whether the EU is fostering rights-based circular migration.

This dissertation examines what has been achieved in relation to the two categories of circular labour migration which are relevant in the context of the EU: temporary engagement of EU settled third-country nationals returning to their countries of origin, and temporary opportunities for entry and re-entry for persons residing in a third country for the purposes of working in the EU.[96] The first category targets third-country nationals who reside in one of the Member States and whom travel back and forth to their country of origin in order to engage in some form of professional activity. This category refers mainly to diaspora members who decide to circulate.

The second category incorporates those third-country nationals who reside outside of the EU but temporarily engage in a professional activity within a Member State and afterwards return to reside in their country of origin. According to the Commission, circularity in this case is to be achieved on the basis of simplified re-entry procedures to and from the Member States, where the migrants were temporarily engaged professionally.[97] This form covers a very broad range of migrant categories - seasonal employment, research, study, intercultural exchanges and voluntary work. As was demonstrated above, in most cases migrants engage in work-related circular migration. Therefore, this dissertation focuses on economically driven circular migration, and it excludes migration where the main purpose is study, intercultural exchange and volunteering.

These two categories of circular migration are to be facilitated at the European level on the basis of a twofold approach. Firstly, the Commission planned to promote it on the basis of a legislative framework: by using existing legal migration instruments and introducing special measures in future legislative acts. Secondly, it has been incorporated as a policy instrument within the context of the Global Approach to Migration and Mobility (GAMM), which is the over-

96 European Commission, 'Communication on circular migration and mobility partnerships between the European Union and third countries', COM (2007) 248 final, Brussels, 16 May 2007, p. 8-9.

97 European Commission, 'Communication on circular migration and mobility partnerships between the European Union and third countries', COM (2007) 248 final, Brussels, 16 May 2007, p. 8-9.

arching framework of the EU external migration and asylum policy. The European Commission has planned to facilitate the development of circular migration schemes with third countries within the framework of the GAMM. This raises the question of what kind of migrant categories this two-fold approach covers.

The first part of EU's approach to circular migration covers the legal migration directives that were adopted before the circular migration concept was introduced in 2005 and which includes: the Long-term Residence Directive[98] and the Researchers'[99] and Students' Directives.[100] It also includes legal instruments that were adopted after 2005 and which featured in the gradual development of the circular migration approach at the EU level: the Blue Card Directive,[101] the Seasonal Workers' Directive,[102] the Single Permit Directive[103] and the Intra-corporate Transferee's Directive.[104] Thus, this legal approach to circular migration encompasses the sectoral legal migration framework that has already been promulgated at the EU level and which regulates the conditions of entry and residence for different categories of immigrants: highly- and low-skilled workers, students and researchers, family migrants and long-term residents. The second part of EU's approach to circular migration, as part of the GAMM, does not limit the spectrum of migrant categories that can participate in circular migration schemes.

In order to analyse the whole spectrum of economically active migrants that can engage in circular migration, this dissertation focuses on both low-skilled (e.g., seasonal) and highly-skilled migrants (e.g., Blue Card holders, researchers, intra-corporate transferees). As was mentioned earlier, circular migration can

98 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L 16.

99 Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service [2004] OJ L 375/12.

100 Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research [2005] OJ L 289.

101 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/17.

102 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94.

103 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member [2011] OJ L 343.

104 Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L 157.

also include migrants that possess a more permanent status. Indeed, one of the forms proposed at the EU level concerns third-country nationals who have settled in a Member State. Hence, it is crucial to include long-term residence holders within the scope of this study. Any such analysis would be incomplete if it were to exclude the family members of third-country nationals who move between two countries for different periods, since this type of migration can have an impact on the family life of the migrants. What should be kept in mind, however, is that in reality these categories are not constant and there are shifts from one form of migration status to another throughout the lives of migrants as they fall in love, reunite with families, settle or decide to restart their engagement in circular migration. Therefore, this study also attempts to take account of these shifts in migration statuses.

To conclude, the purpose of this study is to answer the core research question, which is as follows: how has the EU's approach to circular migration been implemented through its legal and policy instruments and does it provide for rights-based circularity for migrant workers in the Central and Eastern European context? In order to answer that question, this study covers, within its scope, economically active low- and highly-skilled third-country nationals, both with temporary and permanent statuses, and their family members, who are engaged in circular migration to and from the EU.

1.5. Methodological framework

1.5.1. Interdisciplinary research

This PhD dissertation combines international, European and national law and implementation evaluation as part of empirical legal research studies[105] in order to answer the question of how the EU's circular migration approach has been implemented and what the consequences for the rights of migrant workers are. This study focuses on the process of implementation as an object of legal evaluation and not on the impact and effectiveness of the approach under investigation.[106] In line with that focus, the study first examines how the circular migration approach has been transformed into policy, and it then traces the policy formulation process that has taken place at the EU level. Secondly, it focuses on how this policy is put

105 See F. L. Leeuw and H. Schmeets, *Empirical Legal Research. A Guidance Book for Lawyers, Legislators and Regulators* (Edward Elgar Publishing 2016), p. 6; p. 35.

106 See ibid, p. 46.

into action and practice at both the EU and national level by analysing the policy outputs: the activities established to implement the policy (e.g., laws, decisions, etc.). Finally, the study also looks into the outcomes of the circular migration policy in order to assess the practical challenges that are related to the rights of migrant workers in the context of circular migration. Tracing the policy formation and implementation thereof requires a three level analysis – policy formulation at the EU (and national) level, policy outputs developed at the EU and national level and policy outcomes measured at the individual level (see Figure 1.1).

As has already been discussed, the circular migration approach at the EU level has been formulated very broadly, consisting of both legal and policy channels for implementation and which also allows, to a certain extent, policy co-formulation from the Member States at the national level. This occurs mainly through the policy formulation process within the GAMM, whereby countries are able to initiate circular migration projects. As a result of these two channels for the implementation of the circular migration policy, there are two main types of outputs that

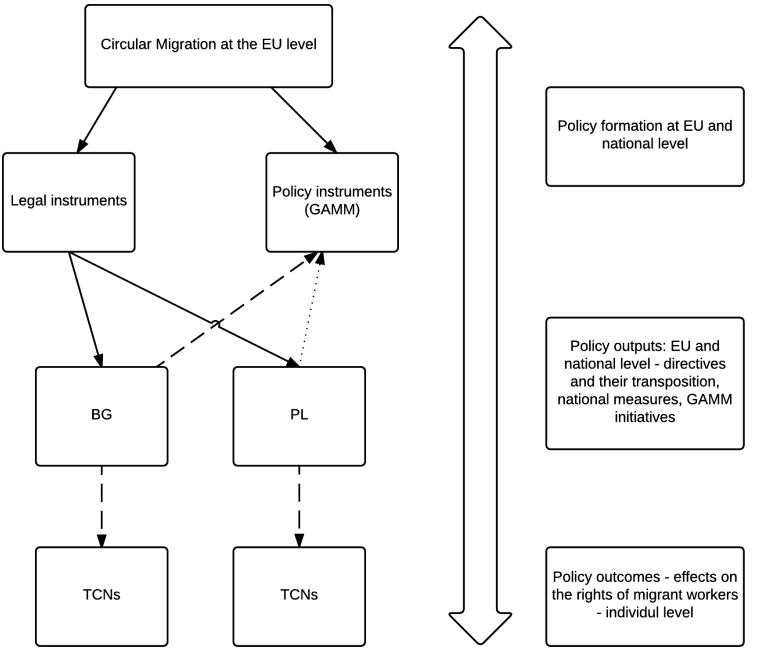

Figure 1.1: Three-level framework for analysis - formation and implementation of EU's circular migration approach through legal and policy channels

can be identified – legal instruments developed at the EU, as well as the national level,[107] and the policy instruments developed as part of the GAMM.

The legal outputs developed at the EU level require implementation, in most cases, at the national level within a margin of appreciation that is given to the Member States, which can additionally have the effect of reshaping these outputs. Furthermore, those cases where EU law has not been correctly transposed also need to be considered. In addition, the legal outputs developed at the national level, such as bilateral agreements, should also be examined in this dissertation. Finally, different policy outputs – such as circular migration initiatives and bilateral social security agreements – can be identified as a result of the Member States' participation in the GAMM, such as for example in Mobility Partnerships, which are one of the "principle bilateral frameworks for facilitating policy dialogue and operational cooperation with partner countries".[108]

In order to assess the implementation of the formulated policies and established outputs at both the EU and national level, this study also looks at a third level – the individual level – where the circular migration policy outcomes can be assessed. Taking into consideration the policy outcomes makes it possible to analyse whether migrant workers benefit from rights-based circular migration in practice.

1.5.2. Comparative case study research design

This PhD project employs a comparative case study research design as part of the legal empirical research methodology.[109] The case study approach is considered to be the most suitable because it allows for the developed policy outputs at the national level to be examined in their specific legal systems/contexts and it also provides for a "detailed consideration of contextual factors".[110] Furthermore, by

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107 Chapter 5 outlines in details the different EU legal instruments that need to be considered in the analysis: instruments that explicitly mention among their aims the facilitation of circular migration, instruments that do not mention this term explicitly but contain some circular migration elements, and instruments providing flanking rights and thus contributing to rights-based circular migration.

108 European Commission, 'Report on the Implementation of the Global Approach to Migration and Mobility 2012-2013', COM (2014) 96 final, Brussels, 21 February 2014, p. 2. The other principal framework is the Common Agendas on Migration and Mobility (CAMMs). Two CAMMs with Ethiopia and Nigeria have been signed so far. Therefore this instrument is left outside the scope of this dissertation.

109 See Leeuw and Schmeets, *Empirical Legal Research. A Guidance Book for Lawyers, Legislators and Regulators*, p. 13.

110 A. L. George and A. Bennett, *Case Studies and Theory Development in the Social Science* (Cambridge, MA: MIT Press, 2005), p. 19.

employing a comparative strategy to the case study approach, one can study the differences in the transposition of the EU legal instruments that have bearing to circular migration, the establishment of national instruments as part of the legal frameworks of the countries, as well as the implementation of circular migration through the GAMM policy channels.

According to Yin, the case study is "an empirical study that investigates a contemporary phenomenon within its real-life context, especially when the boundaries between the phenomenon and context are not clearly evident".[111] Another advantage of the case study method is that it is able to "test views directly in relation to phenomena as they unfold in practice".[112] It can be employed as an umbrella strategy for conducting research that is capable of employing a range of different research methods and data sources.[113]

The selection of the case is the most critical step in undertaking any case study research.[114] There are single case studies that are typically used for anthropological studies and multiple case studies that are more often used in the ambit of sociological research.[115] This PhD study is focused on a multiple-case study comparison. In particular, it employs a "most similar system" design,[116] which is a method that focuses the analysis on comparable cases within the same geographical-cultural area and allows to identify factors that help understanding differences in outcomes.

Comparative legal enquiries usually consist of three major steps – a selection of what is to be compared, a description of the law and its context and an analysis thereof.[117] The first step begins with a determination of the basis of comparison, containing the objects of comparative research and the sources that are consulted.[118] Even though researchers conducting comparative legal enquiries are

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111 R. K. Yin, *Case study research: Design and methods* (2 edn.: Newbury Park, CA: Sage Publications, 1994), p. 13.

112 B. Flyvbjerg, 'Five Misunderstandings About Case-Study Research', *Qualitative Inquiry,* 12/2 (2006), p. 235.

113 L. Webley, 'Qualitative Approaches to Empirical Legal Research', in P. Cane and H. Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010), p. 940.

114 R. E. Stake, 'Case Studies', in N. K. Denzin and Y. S. Lincoln (eds.), *Handbook of Qualitative Research*, (Thousand Oaks, Sage Publications, 1994), p. 243.

115 Webley, 'Qualitative Approaches to Empirical Legal Research', p. 940.

116 See A. Lijphart, 'The Comparable-cases Strategy in Comparative Research', *Comparative Political Studies,* 8/2 (1975), p. 159.

117 G. Dannemann, 'Study of Similarities or Differences?', in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook on Comparative Law* (Oxford University Press, 2006), p. 406.

118 Ibid., p. 407.

generally advised to look for both similarities and differences[119] at the selection stage, the researcher must strive to have at least a minimum similarity in order to provide a basis for the comparative analysis.[120] Thus, selecting countries from the same legal family and which – in the context of this study – share a similar communist past, those that are part of the latest enlargement of the EU, that are active in the Eastern Partnership and that attract migrants from the same regions, were among the criteria that were used to choose the countries for the purposes of this case study. These common characteristics thereby allow the researcher to account for whether similar laws and policies have similar or different outcomes when they are applied in the same contexts.

The next section describes the case selection in greater detail. It shows that the two countries that are under analysis in this dissertation share common characteristics, which allows the researcher to test the findings derived from the two country comparisons. Even if the results from this study cannot be formally generalised in the end, it follows that purely descriptive case studies still have the potential to contribute to the "process of knowledge accumulation" in the field of legal empirical research and it can "certainly be of value in this process and has often helped cut a path toward scientific innovation".[121]

1.5.3. Case study selection: Bulgaria and Poland

Bulgaria and Poland have been selected from the CEE countries as the two cases that will be compared in this dissertation. They share similarities and differences, which as mentioned above, makes them useful subjects for comparative research. Firstly, due to their geographical proximity, ethnic and historical ties, these two countries attract migrants from the former Soviet Union republics that are situated in the Eastern European neighbourhood and from Russia. Therefore, this case selection allows the study to focus geographically on the implementation of the EU's circular migration approach with regard to the Eastern Partnership countries. Secondly, they share similar contextual factors – they are former communist countries with some experience in temporary migration, they are new Member States with a geopolitical interest in the Eastern Partnership and they participate in the GAMM instruments with these countries. Finally, there are also differences

119 See ibid., p. 419.
120 K. Zweigert and H. Kötz, 'An Introduction to Comparative Law', (3 edn.: Oxford University Press 1998), pp. 34-35.
121 B. Flyvbjerg, 'Five Misunderstandings About Case-Study Research', p. 227.

between them that pertain to their legal and policy contexts – they both experienced different EU accession processes, which resulted in distinctive national migration legislation and a differing transposition of the relevant EU legislation.

Contextual factors: similarities and differences

Bulgaria and Poland share a similar communist history of immigration, when inward and outward flows were heavily controlled up until 1989. Temporary labour migration took place mainly within the Soviet bloc or on the basis of bilateral agreements that were concluded with other Soviet countries. Poland had a continuous excess of labour supply and Poles were involved in regular migration related to temporary employment in neighbouring Czechoslovakia and Hungary, as well as engaged in petty trade that was performed under the guise of tourism. This was a type of circular mobility that became a widespread phenomenon in the 1980s, which was known as 'incomplete migration'.[122] Later on in the 1990s, this type of mobility was referred to as 'shuttle mobility' and it started to take place from former Soviet Republics, especially from Ukraine, Belarus and Russia.

Temporary migration opportunities were also present in communist Bulgaria. The country concluded bilateral agreements with other socialist countries for the exchange of workers. For example, in the 1980s, a large number of Bulgarians worked in the construction and timber industries of the Komi Autonomous Soviet Socialist Republic under an exchange agreement that was signed with the Soviet Union.[123] Furthermore, some Vietnamese construction workers were sent to Bulgaria under agreements that were concluded in the 1980s.

Additionally, both Bulgaria and Poland are slowly developing away from countries of immigration and transit, to new countries of immigration. As such, the two countries have a very similar share of foreign born individuals as a percentage of the population – in Bulgaria this constitutes 1.9 % of the population[124] and in Poland this constitutes 1.6 % of the population.[125] More specifically, the foreign-born population in non-member countries totals 1.2 % in Bulgaria and 1.1 % in

122 See section 1.2. above and Chapter 6 of this dissertation.

123 See Chapter 7 of this dissertation.

124 Since the writing of this PhD thesis commenced in 2014 there has been a 10% increase of the stock of foreign-born persons residing in Bulgaria. OECD data from International Migration Outlook 2017, retrieved at http://www.keepeek.com/Digital-Asset-Management/oecd/social-issues-migration-health/international-migration-outlook-2017/bulgaria_migr_outlook-2017-10-en#.WcPFW-VdWdw8#page1 (accessed 21 September 2017).

125 Eurostat data on Foreign-born population by country of birth as of 1 January 2016, retrieved at http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Foreign-born_population_by_country_of_birth,_1_January_2016_(¹).png (accessed 21 September 2017).

Poland, both of which are a percentage of the overall population. As of 1 January 2016, there are 136 421 foreign-born individuals in Bulgaria (both EU and non-EU migrants).[126] By way of comparison, in Poland the total of both EU and non-EU migrants is 626 396.

However, the two countries differ with regard to the main countries of origin of immigrants. In Bulgaria, according to the latest OECD data from 2016, the main countries of origin of non-EU country nationals are Russia (18.9 % of the total foreign-born population), Syria (8.6%), Turkey (7%) and Ukraine (5.6%).[127] In Poland, as of 2015, Ukrainians formed 43% of the total number of foreigners, followed by Belarusians (4.7%), Vietnamese (4.4 %), Chinese (3.5%) and Russians (3.2 %).[128] In Bulgaria, until 2016, Russians were the largest group of third-country nationals with first residence permits and, in the past couple of years, Ukrainians have become the third largest group (see the table below). In Poland, Ukrainians are in the majority, followed by Belarusians as the second largest group and Russians were in the top five until 2016.

126 Eurostat data on Foreign-born population, retrieved at http://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=tps00178 (accessed 21 September 2017).

127 OECD data from International Migration Outlook 2017, retrieved at http://www.keepeek.com/Digital-Asset-Management/oecd/social-issues-migration-health/international-migration-outlook-2017/bulgaria_migr_outlook-2017-10-en#.WcPFWVdWdw8#page1 (accessed 21 September 2017). These are also the countries according to the available Eurostat data as of 1 January 2016, even though the percentages are higher. Retrieved at http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Main_countries_of_citizenship_and_birth_of_the_foreign_foreign-born_population,_1_January_2016_(1)_(in_absolute_numbers_and_as_a_percentage_of_the_total_foreign_foreign-born_population).png (accessed 21 September 2017).

128 OECD data from International Migration Outlook 2017, retrieved at http://www.keepeek.com/Digital-Asset-Management/oecd/social-issues-migration-health/international-migration-outlook-2017/poland_migr_outlook-2017-33-en#.WcPJLldWdw8 (accessed 21 September 2017). Eurostat data on main countries of citizenship and birth of the foreign-born population as of 1 January 2016 is not available for Poland. Retrieved at http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Main_countries_of_citizenship_and_birth_of_the_foreign_foreign-born_population,_1_January_2016_(1)_(in_absolute_numbers_and_as_a_percentage_of_the_total_foreign_foreign-born_population).png (accessed 21 September 2017).

CITIZEN OF	2013
Russia	2,930
Turkey	1,044
Ukraine	476
China	219
Kazakhstan	194
TOTAL	6,436

CITIZEN OF	2014
Russia	3,307
Turkey	2,347
Ukraine	598
China	260
FYROM	234
TOTAL	8,795

CITIZEN OF	2015
Russia	2,782
Turkey	2,558
Ukraine	1,488
FYROM	300
Kazakhstan	234
TOTAL	9,595

CITIZEN OF	2016
Turkey	2,838
Russia	1,509
Ukraine	1,086
FYROM	348
Serbia	206
TOTAL	7,942

Table 1.1. Top five of first residence permits in Bulgaria per country of citizenship (2013-2016). Source: Eurostat[129]

CITIZEN OF	2013
Ukraine	171,769
Belarus	69,958
Moldova	6,746
Turkey	4,436
Russia	3,868
TOTAL	273,886

CITIZEN OF	2014
Ukraine	250,054
Belarus	74,062
Moldova	6,160
Turkey	4,581
Russia	3,633
TOTAL	355,521

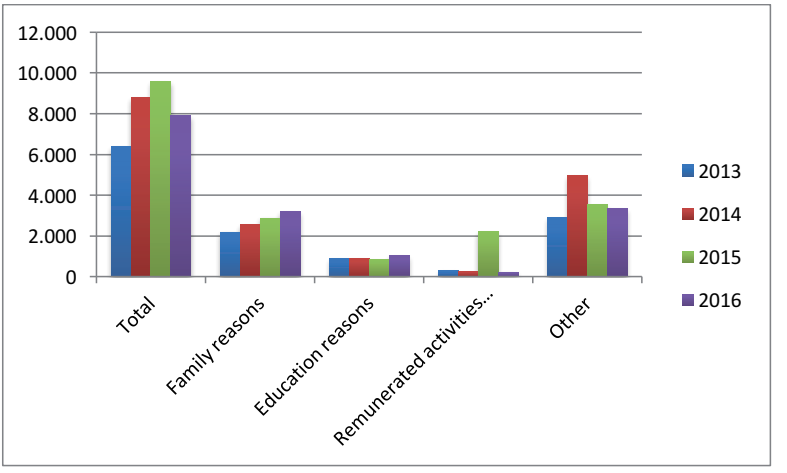
CITIZEN OF	2015
Ukraine	430,081
Belarus	75,394
Moldova	7,987
Turkey	4,226
Russia	3,932
TOTAL	541,583

CITIZENOF	2016
Ukraine	512,552
Belarus	28,165
Moldova	7,613
India	5,473
Turkey	5,133
TOTAL	585,969

Table 1.2. Top five of first residence permits in Poland per country of citizenship (2013-2016). Source: Eurostat.

129 Eurostat data on first permits by reason, length of validity and citizenship as of 18.08.2017, retrieved at http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_resfirst&lang=en (accessed 21 September 2017).

The two countries also contrast with regard to the reasons for immigration of the first permit holders. Bulgaria attracts mainly family migration and Poland attracts primarily labour migration (see graphs 1.1. and 1.2). A total of 69.3 % of the permits that were issued in Poland in 2015 were related to employment, compared to 23.6 % in Bulgaria.[130] Furthermore, at the end of 2015, Poland was the first destination for employment related reasons in the EU with 53 % (375 342) of all permits issued for employment reasons in the EU.[131] Conversely, in 2015 the family reunion permits accounted for 30.3 % in Bulgaria compared to 0.2 % in Poland (see also the graphs below).[132]

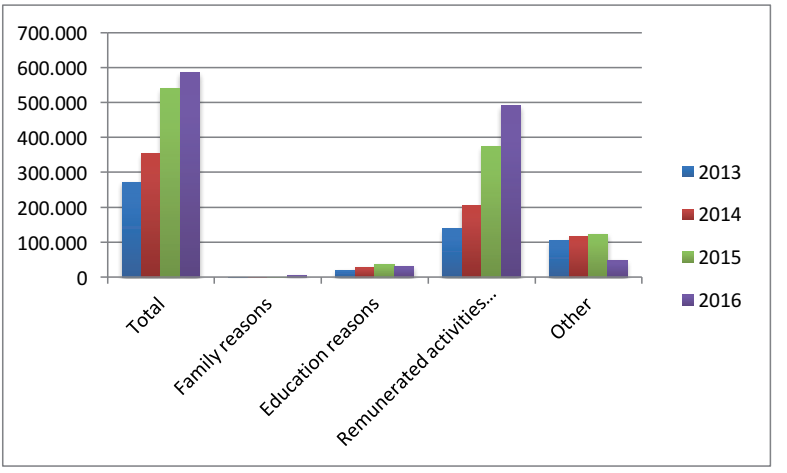


Graph 1.1. First permits by reason, Bulgaria (2013-2016). Source: Eurostat.

130 Eurostat data on total number of first residence permits issued by reason in 2015 retrieved at http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Total_number_of_first_residence_permits_issued_by_reason,_in_2015.png (accessed 21 September 2017). This number excludes the workers coming through the simplified procedure whom work on the basis of a visa.

131 Eurostat data on total number of first residence permits issued by reason in 2015 retrieved at http://ec.europa.eu/eurostat/statistics-explained/index.php/Residence_permits_statistics#Residence_permits_by_reason (accessed 21 September 2017).

132 Eurostat data on total number of first residence permits issued by reason in 2015 retrieved at http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Total_number_of_first_residence_permits_issued_by_reason,_in_2015.png (accessed 21 September 2017).



Graph 1.2. First permits by reason, Poland (2013-2016). Source: Eurostat.

Legal and policy context: similarities and differences

Both countries share certain similarities that allow for a basis of comparison in legal and policy terms (see table 1.3 below). They are both former communist countries, they have common historical and cultural links and they are both new Member States from the fifth EU enlargement (Poland acceded to the EU in 2004 and Bulgaria acceded to the EU in 2007). Furthermore, both countries adhere to the civil law legal tradition, but remnants of their former Socialist legal tradition are still present in their respective legal frameworks.[133]

As new Member States, Poland and Bulgaria were obliged to apply all of the Justice and Home Affairs (JHA) legal instruments, without the possibility to opt out. Therefore, all these instruments, including those incorporating circular migration elements, had to be transposed into their national law. Additionally, the two countries have chosen to participate in Mobility Partnerships with Eastern Partnership countries.

133 See for instance R. Manko, 'Survival of the Socialist Legal Tradition? A Polish Perspective', *Comparative Law Review* 4/2 (2013).

Legal/Policy issue	Bulgaria	Poland
Legal family	✓	✓
New Member States	✓	✓
Participation in Mobility partnership with Eastern partnership countries	Moldova (2008) Georgia (2009) Armenia (2011) Azerbaijan (2013) Belarus (2016)	Moldova (2008) Georgia (2009) Armenia (2011) Azerbaijan (2013) Belarus (2016)
Part of the Schengen area	☒	✓
Circular migration policy/scheme	☒ negotiations for bilateral agreements with Ukraine and Moldova	✓ Belarus Georgia Moldova Russia Ukraine Armenia

Table 1.3. Similarities and differences in legal and policy context of Bulgaria and Poland

Bulgaria and Poland both underwent a transition from communism to democracy and when they started their accession periods, the EU rules "had to compete with a layer of old regulations inherited from the communist regimes".[134] These processes are part of the legal context of both countries and they must naturally be taken into consideration in the comparative case study analysis. However, even though both countries are new EU Member States, they had different EU accession periods, which resulted in distinctive national migration legislation and different transposition of the EU legislation.

Moreover, the EU migration policy is an area of shared competence and Member States have a certain discretion, which is an important part of the legal context and therefore it must also be considered. As a result of this, for example, Poland has developed a scheme that facilitates circular migration through its national legislation under the aegis of the GAMM[135] whilst Bulgaria does not have such a scheme

134 D. Toshkov, 'Compliance with EU law in Central and Eastern Europe: The Disaster that Didn't Happen (Yet)', (2012), p. 4.

135 See Chapter 6 of this dissertation.

currently. Another difference in the policy contexts is that Poland has become a member of the Schengen area and it fully applies the Schengen *acquis*. Bulgaria, however, is still a candidate country and it is still awaiting the political approval that is required in order to become a member of the Schengen area.

In order to examine the challenges that are related to migrant workers' rights in the context of circular migration and ensure the comparability of the data, one should focus on migrants with similar characteristics. Since the geographical focus of the study is on migrants circulating from the Eastern neighbourhood countries to the EU, the first logical step is to determine the largest immigrant groups in Bulgaria and Poland respectively. According to the most recent available data, in the case of Bulgaria, the two main countries of origin of first residence permits holders from the Eastern neighbourhood countries are Russia and Ukraine. In the case of Poland, this is Ukraine followed by Belarus, Moldova and Russia (see table 1.2 above).

Apart from being the largest immigrant group that have been granted first residence permits in the EU 28,[136] the data shows that Ukrainians are among the largest immigrant group from the Eastern Partnership countries in both Poland and Bulgaria; therefore it is logical to identify them as one of the immigrant groups that are suitable for the aims of this research. Russians are the largest immigrant group in Bulgaria, and Russia is in the top five of the countries of origin of immigrants in Poland. Furthermore, Russia is in the top ten of the immigrant groups that are granted first residence permits in the EU 28.[137] Even though Russia is not one of the Eastern Partnership countries, it is an important partner in the external dimension of EU migration policy and more specifically within the context of the GAMM (at least until the annexation of Crimea, when all migration-related EU–Russian dialogues were suspended). Therefore, Russians are identified as the second suitable group for the purposes of ascertaining the research aims of this study.

136 Eurostat data on evolution of main groups of citizenship granted a first residence permit in the EU-28, 2012-15 retrieved at http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Evolution_of_main_groups_of_citizenship_granted_a_first_residence_permit_in_the_EU-28,_2012-15.png (accessed 21 September 2017).

137 Eurostat data on evolution of main groups of citizenship granted a first residence permit in the EU-28, 2012-15 retrieved at http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Evolution_of_main_groups_of_citizenship_granted_a_first_residence_permit_in_the_EU-28,_2012-15.png (accessed 21 September 2017).

1.5.4. Data sources

The comparative case study approach is carried out through the use of legal and policy sources, and qualitative data that has been gathered as a result of semi-structured interviews and focus groups. The legal and policy sources, in combination with the semi-structured interviews with the relevant policy actors, are mainly used for the analysis of the formation and implementation of the EU's circular migration approach through the established outputs at both the EU and the national level. The semi-structured interviews are used to fill the gaps in the interpretation and implementation of legal and policy sources when analysing the EU's approach and also national instruments that facilitate circular migration. The aim of the focus groups is to examine the perceptions of migrant workers and thus the outcomes at the individual level.

1.5.4.1. Legal sources

This study cannot be accomplished without first conducting a thorough analysis of the European primary and secondary legislation: the EU treaties, EU regulations and the EU legal migration directives, as well as national legal acts on foreigners and labour migration. Universal and regional human rights instruments, as well as EU internal market law, are also used to construct a rights-based analytical framework that supports the assessment of the developed circular migration policies (see Chapter 3 and Annex V). The case law of the ECtHR, the CJEU and cases of the national courts in Bulgaria and Poland are also considered throughout this research.

Furthermore, national legal acts are analysed so as to track the implementation of the EU's approach to circular migration at the national level. This also includes taking stock of the transposition of EU directives in the area of legal migration and other sources of EU law (e.g., on visa and social security matters) that incorporate elements of circular migration into the national laws on foreigners, migration and employment in Bulgaria and Poland respectively.

1.5.4.2. Policy and academic sources

Policy documents at the international, European and national level, in Bulgaria and Poland, as well as in the Eastern Partnership countries that participate in Mobility Partnerships are also used as data sources. Firstly, the reports of international organisations are studied so as to trace how the concept of circular migration has emerged in the international organisations' agenda and how it has been transferred into the EU's policy making arena. Secondly, EU policy sources, such as the Communications of the European Commission, are used to conceptualise the term circular migration and to trace its two-fold implementation at the EU level.

In addition, data consisting of academic publications and NGO reports is employed in order to complement the conceptualisation of the EU's approach to circular migration that is based on EU legal and policy data sources. This concept has attracted a lot of scholarly and policy attention in the years following its introduction and these data sources are able to provide valuable insights into the understanding of its meaning, its key conceptual elements and the policy routes to its implementation.

The policy and academic literature[138] on the topic is also used to trace the implementation of the EU's approach. The reports of Brussels-based NGOs and think-tanks are able to provide valuable insight into the problems that are associated with the concept.[139] Furthermore, the reports that have been produced by the European Migration Network and the European Training Foundation, are among the limited data sources that provide useful insights into the challenges that are related to its implementation at the national level.[140]

Most of the EU related documents that are needed for this study are available online through the websites of the EU institutions and the European Migration

138 For instance, Fargues, 'Circular Migration: Is it relevant for the south and east of the Mediterranean?'. Also the CARIM East explanatory notes examining the demographic, legal and socio-political aspects of circular migration in between Eastern Europe and European Union and within the post-Soviet space retrieved at: http://www.carim-east.eu/database/legal-module/?ls=4&ind=exnocm&lang= (accessed 25 September 2017).

139 Carrera and Hernández i Sagrera, 'The Externalisation of the EU's Labour immigration policy. Towards mobility or insecurity partnerships?'; European Training Foundation, 'Inventory of Migrant Support Measures from an Employment and Skills Perspective. Armenia', (2015); S. McLoughlin and R. Münz, 'Temporary and circular migration: opportunities and challenges', Working Paper No 35, (2011).

140 See for instance, European Migration Network, 'Temporary and Circular Migration: empirical evidence, current policy practice and future options in EU Member States. Synthesis Report'.

Network. The only issue with regards to EU documents is securing access to the so-called "scoreboards", which help to further operationalise the annex of the Mobility Partnerships, listing among other things the state of play of the different projects, the leading partners and the budget thereof. The scoreboards were accessed through official requests for information that were filed to the European Commission or through requests to experts from the national administrations. Most of the legislative acts and policy documents in Poland were available in English. When a document that was needed for the research that was not available in English, research assistance was sought from Polish colleagues and a Polish student from Maastricht University. In Bulgaria all the documents were accessed in either Bulgarian or English. Several official requests for information were filed with the Bulgarian and Polish administrations in order to access statistical data related to the implementation of different instruments analysed in this study.

In order to systematise the results from earlier academic research on circular migration, this study employed a "systematic research review" using the search engines provided by Web of Science, as well as the websites of different publishers and journals, such as Brill Online. Academic references were accessed in English, German, as well as Bulgarian; in the last phase of the study, some specific French references were used.[141]

1.5.4.3. Semi-structured interviews

In order to complement the information on the implementation of the EU's circular migration approach that was gathered through legal and policy sources, this research also employed in-depth interviews with policy-makers and NGOs at the EU and national level in Bulgaria, Poland and some of the Eastern Partnership countries that are participating in Mobility Partnerships. This method is extensively used in empirical legal research because interviews are an effective means of gathering data on other individual's perceptions, views and on the reasoning behind the responses.[142] The study employs semi-structured in-depth interviews, allowing for some set questions formulated on the basis of the analysis of the other data sources but also leaving open-ended questions, which enable the respondents to reflect on the topic on the basis of their experience and perceptions.[143]

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141 The author intensively studied French during the writing of this dissertation.

142 Leeuw and Schmeets, *Empirical Legal Research. A Guidance Book for Lawyers, Legislators and Regulators*, p. 12.

143 Webley, 'Qualitative Approaches to Empirical Legal Research', p. 937.

The main challenge in relation to interviewing is how to avoid biases from both the interviewer and interviewee.[144] Therefore, different authors recommend the use of various techniques in order to make sure that researchers maintain the reliability and validity of their research. Some of the techniques used in this research were: keeping focus on the core questions and themes of the questioning guide, remaining relevant and directed and thus maintaining control; avoiding misleading questions or socially acceptable bias, as well as value judgements, in order to maintain objectivity. In addition, the research also covered a piloting the questioning guide in the first phase of the field research in 2013, as well as checking whether the interviewee had understood the questions and the terms used correctly.[145]

Several semi-structured questioning guides were used: one for policy makers and stakeholders at the EU and national level who were engaged in the formulation and/or implementation of the EU's circular migration approach, and several specific guides, whereby national experts working in one of the six specific policy areas under consideration were interviewed. In a few cases, additional semi-structured guides were used when a given policy actor was approached with a specific set of questions for a second interview, with the aim of gathering additional information.

Firstly, the interview method was used to provide insight into the policy formulation at the EU level. Several EU institutions are involved in the policy formation of the circular migration concept. However, given the complicated legislative and decision-making process at the EU level, it is not always easy to identify the people whom are involved in the development of the concept. Furthermore, since it was introduced almost ten years ago, some of the individuals have either transferred to another Directorate General of the European Commission or left their employment at the EU institutions altogether. Therefore, the only way to create a sample was to use a snowball method.[146] The first interview for this research was carried out at the Centre for European Policy Studies in 2013 and was used as an entry point in the "circular migration policy-making world".[147]

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144 P. M. Brewerton and L. J. Millward, *Organizational Research Methods: A Guide for Students and Researchers* (Thousand Oaks: Sage Publications, 2001), p. 74.

145 See ibid., p. 71.

146 C. J. Gu, 'Interviews', in S. J. Gold and S. J. Nawyn (eds.), *Routledge International Handbook of Migration Studies* (Routledge, 2013), p. 508. K. Goldstein and K. Getting, 'In the Door: Sampling and Completing Elite Interviews', *Political Science and Politics,* 35/4 (2002), p. 671.

147 These interviews were conducted in 2013, outside of the TRANSMIC framework, and therefore did not follow the requirement for registering the informed consent of the respondents.

Thus, by asking every respondent to recommend other potential interviewees, 18 initial interviews were conducted in the period 2013-2014 with officials from EU institutions and representatives of Brussels-based NGOs and think tanks (see Annex I). These interviews allowed the researcher to acquire an initial understanding of the concept and its use. Furthermore, for something that was not in the initial plans of the researcher, it nevertheless assisted in gaining insight into the circular migration discourse at the EU level. This phase also provided the author with the opportunity to pilot the initial developed semi-structured guide, which was slightly adjusted following the initial interviews. During a secondment at one of the headquarters of ICMPD throughout the period between January –March 2017, an additional round of ten interviews with representatives of this international organisation, as well as other relevant policy actors from the Eastern Partnership countries were conducted (see Annex I). Finally, during the final phase of the writing of this thesis, an additional two interviews with European Commission officials were conducted.

Secondly, in order to gain an understanding of how policy formulation is transformed into policy outputs, a total of 45 (23 in Bulgaria and 22 in Poland) interviews with national stakeholders from the relevant authorities in Bulgaria and Poland, as well as NGO representatives, were conducted on the basis of snowball sampling (see Annexes II and III). These interviews were of crucial importance for grasping the co-formation and implementation of the circular migration approach that has been developed at the national level, since very often the policies or legal frameworks that are developed at the national level do not explicitly refer to the term "circular migration". The interviews with policy makers also constituted a source of information about the attitudes toward this approach and they provided an explanation of some of the policy decisions in this regard. Finally, interviews with lawyers and national experts from academia, NGOs and think tanks were conducted so as to ascertain a critical view of the implementation (or lack thereof) of the circular migration approach and the consequences that this has on the rights of the migrant workers (see Annexes II and III).

1.5.4.4. Focus groups

The focus group (or group interview) entails a collective interview process.[148] Its purpose is to understand how people think or feel about a certain issue, to gather opinions[149] and to provide opportunities for the participants to share their experiences.[150] There are several reasons why focus groups were chosen as a method for examining the policy outcomes at the individual level rather than by recourse to individual interviews. Firstly, the main feature that distinguishes focus groups from individual interviews is that they produce what is referred to as "interactive data".[151] Focus groups are a unique method because they allow data to be gathered from both the individual and from the individual as part of a group.[152] It is driven by the communication between participants with specific shared characteristics that relate to the topic of the focus group.[153] This allows the research to ascertain a richer knowledge of the subject that is being discussed because the topics and opinions "unfold and are negotiated in the focus group's discussion".[154] It also provides the opportunity for direct comparisons among the experiences and views of the participants, rather than analysing differences of the interviewees on the basis of aggregated individual data.[155]

Secondly, this method is often used to determine an individual's reaction to the introduction of a policy or a policy change that affects a population in order to provide a policy evaluation.[156] Focus groups were therefore considered to be a suitable method for the purposes of this research because on the basis of the group interactions they bring the perspective of migrants on the challenges related to their circulation and rights in the six policy areas identified as pertinent to circular

148 R. S. Weiss, *Learning from Strangers. The Art and Method of Qualitative Interview Studies* (New York: The Free Press, 1994), p. 25.

149 L. S. Ayala, 'Interviewing techniques for migrant minority groups', in C. Vargas-Silva (ed.), *Handbook of Research Methods in Migration* (Edward Elgar Publishing, 2012), p. 123.

150 R. A. Krueger and M. A. Casey, *Focus Groups. A Practical Guide for Applied Research* (5 edn.: SAGE Publishing 2015), p. 2.

151 O. Massey, 'A proposed model for the analysis and interpretation of focus groups in evaluation reserach', *Evaluation and Program Planning* 34 (2011).

152 L. C. Hydén and P. H. Bülow, 'Who's talking: drawing conclusions from focus groups—some methodological considerations', *International Journal of Social Research Methodology,* 6/4 (2003), p. 306.

153 Ibid.

154 Massey, 'A proposed model for the analysis and interpretation of focus groups in evaluation reserach', p. 21.

155 Krueger and Casey, *Focus Groups. A Practical Guide for Applied Research*, p. 2.

156 Hydén and Bülow, 'Who's talking: drawing conclusions from focus groups—some methodological considerations', p. 307. Krueger and Casey, *Focus Groups. A Practical Guide for Applied Research*, p. 8. J. H. Frey and A. Fontana, 'The Group Interview in Social Research', *Social Science Journal,* 28/2 (1991), p. 176.

migration. Thus, it allows for an examination of policy outcomes at the individual level. Fourthly, focus groups complement the other methods used in this research and they build upon the findings that are derived from the legal and policy analysis and the data gathered from the interviews with policy makers and thus allow for triangulation by adding "the human element of the voices of multiple subjects".[157]

Finally, there were certain pragmatic considerations as a result of this method. The combination of focus groups with interviews "has the advantage of getting reactions from a relatively wide range of participants in a relatively short time".[158] Therefore, focus groups were considered to be an efficient research method, especially given the limited duration of the periods of field research that were possible under this PhD study.

Some of the critiques of the use of focus groups include the argument that focus group participants could make up the answers, that the dominant participants could influence the results and that this method may produce unreliable and trivial results.[159] As with any other research method, the reliability question and the quality of the results produced concerns the sampling approach and the recruitment strategy used, as well as how many groups and how large those groups are. The justification of all the steps that were taken in designing this research are presented below. Another important factor for the successful implementation of the focus groups concerns the role and skills of the moderator, which in this study served as "a levelling force that allows participants to reflect on various arguments without pressure".[160] In order to prevent making up answers amongst the participants, the research employed a strategy of presenting, in detail, the rules of the method and asking additional questions during the interviewing process for the avoidance of any doubt. Furthermore, these problems are considered to be minimised when multiple strategies of inquiry are employed.[161]

The aim of the focus group is to gather the opinions of individuals who have something in common. The first common feature of migrants that needs to be considered is their country of origin. As was already mentioned above, Ukraine and Russia were identified as the most suitable countries of origin with regards to the aim of this study. Another important feature that the focus group participants needed to have in common was to be economically active in line with the defini-

157 D. L. Morgan, 'Focus Groups', *Annual Review of Sociology,* 22 (1996), p. 139.
158 Frey and Fontana, 'The Group Interview in Social Research', p. 178.
159 Krueger and Casey, *Focus Groups. A Practical Guide for Applied Research*, pp. 14-16.
160 Ibid., p. 16.
161 Ibid., p. 14.

tion that was adopted by this study. As the respective national legislation of Poland and Bulgaria does not refer to a "circular migrant status", the aim was to select migrants who are labour migrants and employed workers. Focus groups need to be homogeneous, but there must also be sufficient variation therein.[162] Therefore, the focus groups that were carried out with Ukrainians and Russians included both low- (e.g., seasonal) and highly-skilled workers (e.g., Blue Card holders, national permit holders). They also included migrants who had recently retired. This group of participants offered a perspective on the challenges related to pension rights that migrants who are still in employment cannot provide. Therefore, their participation in the focus group was considered to be important.

Additionally, one of the characteristics of circular migrants is that they circulate repeatedly between their countries of origin and destination. Therefore, the participants recruited for the focus groups had to have returned, at least once, to their country of origin and have come back to Bulgaria or Poland respectively. Furthermore, since circular migration is not exclusively limited to temporary stays and since it does not exclude the circular migration of permanently settled migrants, both migrants with either temporary or permanent status were considered suitable for participation in the focus groups.

Thus the selection criteria for the focus groups included: country of origin (Russia and Ukraine); legal status: temporary and permanent residence permit holders; economic status: employed economic migrants and retirees; when possible with circular migration experience: returning to the country of origin (Russia / Ukraine) for work-related reasons (e.g., return for work under a temporary contract in the country of origin or renewal of documents related to work permits /residence permits).

The potential focus group participants were recruited in several different Bulgarian and Polish cities on the basis of snowball sampling, which is an approach that helps the researcher to locate "information-rich key informants" or events that serve as a starting point for the development of the sample.[163] The strategies for finding potential participants included the identification of informants from the immigrant communities on the basis of meetings with different stakeholders. The informants were asked to think of migrant workers who fitted the focus group profile and were asked to distribute the brochure among their community or network. Sometimes informants directly contacted the researcher with ideas for

162 Morgan, 'Focus Groups', p. 134.
163 Krueger and Casey, *Focus Groups. A Practical Guide for Applied Research*, p. 81.

potential participants and in other cases, participants contacted the researcher directly.

Among the informants in Bulgaria were the representatives of the International Organisation for Migration and its Integration Offices in Sofia and Bourgas, representatives of the Bulgarian Red Cross, NGOs working in Varna, the network of the "Multi Kulti Collective" Association, contacts received form the interviewees, as well as personal contacts. One of the members of the "Multi Kulti Collective" Association supported the recruitment process of focus groups participants in Bulgaria. The recruitment strategy for Russian migrants was covered, among others, by contacting Russian restaurants in Sofia, the Russian Culture Centre and the Russian Embassy, as well as all shops from the Russian chain "Berizoka". Ukrainians were recruited through Facebook groups, through the Ukrainian association "Matti Di" and through other informal events. An information brochure was prepared in line with the developed ethics self-assessment procedure, which was translated into Ukrainian and Russian and which was distributed among more than 65 different informants and 17 Facebook groups.

The recruitment process in Poland followed the same strategy. The only difference was that the recruitment of potential focus group respondents was supported by the network of interviewers and scholars working at the Centre for Migration Research in Warsaw. At the time of the field research in the period from October-December 2016, the Centre was conducting a survey among Ukrainians in Poland and some of the focus groups participants were recruited through this pool of migrants, adhering to the ethical standards of the Centre's survey. In addition, one of the interviewers of the Centre served as a focus groups recruiter in the Ukrainian and Russian communities in Warsaw. Representatives of NGOs providing support to migrants in Warsaw were among the informants of the study. Finally, the prepared information brochure was distributed among the Russian and Ukrainian churches in Warsaw, the Russian Cultural Centre "Ośrodek rosyjskiej kultury", several Russian restaurants, more than 14 Facebook groups and 12 "vk.com" groups.

The recruitment of Blue Card holders was organised in a slightly different manner. It required the identification of companies employing Blue Card holders from the Eastern Partnership countries and from Russia. On the basis of the information obtained from informants in Bulgaria, it became clear that it was primarily IT companies that utilised the Blue Card Directive. It took more than two months of targeted attempts to identify a company that was willing to give access to

its employees for the sake of conducting several focus groups. After the field research in Bulgaria was conducted, the Bulgarian IT company facilitated the access to another Polish enterprise that recruited migrants through the Blue Card mechanism.

The recruitment period lasted for three months in both countries. In Bulgaria, even though Ukrainians were the smaller immigrant group when compared to Russians, they were easier to find and, furthermore, they were eager to participate in the study. Finding Russian migrants that were willing to take part in the focus groups turned out to be a great challenge in both countries. Despite the broad network of informants used to recruit Russian participants, they were very often not interested in participating or they did not match the desired profile. Most of the Russians who agreed to participate were highly-skilled, which according to the study's informants matches the general profile of Russian migrants in these two countries.

Furthermore, the initial profile that was envisaged in the research design had to be adapted several times. In Bulgaria it was extremely difficult to find "true" labour migrants who had an employment contract and came to work as employed persons. Most of the migrants that were reached were students, businessmen or came through family reunification. In addition, it was impossible to find migrant workers who were circulating voluntarily between Bulgaria and their country of origin. There is, however, a particular reason for that, which is presented in the Bulgarian chapter of this study. Voluntary circular migration seemed to be a typical feature only for students and businessmen. Thus, the final sample for the focus groups in Bulgaria had to be broadened and it ultimately included labour migrants, as well as family migrants and migrants with registered companies. Some of them had circulated; some of them did not have this experience. In Poland the biggest challenge that was encountered, apart from recruiting Russian migrants, was finding migrants that were working legally in Poland. It turned out that many migrant workers coming through the Polish simplified procedure entered the country legally but were working irregularly without any employment contract.

Initially the research design of the study included in its scope also focus groups with seasonal workers. However, it was impossible, in both Bulgaria and Poland, to find any seasonal workers who were working legally. According to the assessment of the Ethics Advisory Body (EAB) that is presented below, only legal migrants could be interviewed for the purposes of this study. Furthermore, these types of

workers were engaged in different sectors in the countries chosen for case studies. In Bulgaria they worked primarily in tourism and in Poland they worked mainly in agriculture. This required an additional recruitment strategy and an extended field research period, which did not fit the timeline of the dissertation. Therefore, they were left outside of the scope of the focus groups. In order to compensate for this empirical gap, additional interviews with employers recruiting seasonal workers were conducted in both Poland and Bulgaria.

A total of nine focus groups were conducted as part of this study: four focus groups in Bulgaria and five focus groups in Poland. Four of the focus groups covered general labour migrants and the rest included only Blue Card holders (see Annex IV).

1.5.5. Data analysis

This study uses content analysis to examine the legal and policy texts under consideration, as well as the interview transcripts that were generated as part of the research. [164] Some content analysts use "purposive sampling, less quantification and more interpretation in their development of codes and their treatment of those codes".[165] This was the approach followed in this study. The developed codes were used on the printed interview transcripts and attention was drawn to them by highlighting parts of the text in different colours in the files in order to allow for the data to be categorised. The interviews were clustered around three different groups (see Annexes I-III) and several subgroups matching the six policy areas, which are part of most of the chapters. This, alongside the limited time frame, was the reason why the study did not employ a software supported content analysis.

1.5.6. Ethical considerations

This study uses interviews and focus groups with migrants to examine how EU and national legislation is implemented in practice, and what the challenges for the migrant workers are. Thus, the project includes human participation, in particular by policy actors and migrants, and thus the use of personal data, including

164 M. Patton, *Qualitative evaluation and research methods* (CA: Sage, 1990), p. 176.
165 Webley, 'Qualitative Approaches to Empirical Legal Research', p. 941.

information relating to ethnicity. This section outlines the ethical standards that were employed throughout the PhD study.

As this dissertation is part of the TRANSMIC project, its methodology had to be reviewed by an interdisciplinary Ethics Assessment Board (EAB) at Maastricht University. The EAB reviewed the procedure for recruiting participants for the interviews and the focus groups, the procedure for handling any sensitive or personal data collected and the informed consent procedure. The review was done every year within the duration of the PhD project and the ethical self-assessment was revised and updated in line with the recommendations of the EAB.

The research activities were designed to ensure respect for people and for human dignity, the fair distribution of research benefits and burden and protecting the values, rights and interests of the research participants. In order to achieve that, following the assessment of the EAB, only migrants that possessed a legal status were recruited for the focus groups. The sampling excluded migrants who were not be able to give informed written consent themselves or to provide ways of evidencing both the informed consent and the understanding of the risks that the project could bring for them.

The 'information sheets' were translated into Russian and Ukrainian and they formed part of the invitation for the recruitment of participants for the focus groups. Migrants gave informed consent orally during the recruitment phase. On the day of the focus group, participants received an 'informed consent form' in one language and in terms that were fully understandable to them, respectively in Bulgarian, English, Russian and Ukrainian. The documents contained the aims, methods (how the data would be used in the analysis), duration and implications of the research (including the impact on national and EU immigration policies), the nature of the participation (interviews) and any benefits, risks or burdens that might be involved as a result.

The 'informed consent form' and the detailed 'information sheets' also explicitly stated that participation was voluntary and that each individual had the right to refuse to participate and to withdraw their participation, or data at any time — without any consequences. The participants were informed about their right to ask questions and receive understandable answers before making a decision. They were provided with the names and contact details of the principal researcher conducting the research, the supervisors of the principal researcher and the EAB's complaint procedure. The focus groups participants gave their consent in writing

by signing the 'informed consent form' or by signing an 'informed consent list' stating that they had been informed orally. The participants had their costs covered (transportation and food) and received a small remuneration in the form of a "voucher".[166]

Policy-makers and other stakeholders were not covered by the informed consent procedure that was envisaged for the migrant workers. They were invited through an invitation, which contained information about the project, its aims, focus and the purpose of the interview. Once they agreed to an interview (either via e-mail or telephone call), an interview was then scheduled. At the beginning of the interview, the project information was repeated and they were asked whether they agreed to be recorded. Their consent was recorded or they were provided with a simplified informed consent form for stakeholders. Stakeholders could choose to be anonymous and most of them preferred this option.

The current research involved collecting and processing personal data through interviews and focus groups. The personal data included name, occupation, age, type of work and/or residence permit, citizenship, ethnicity, circular migration history and telephone number/e-mail. Ethnicity is sensitive personal data that was collected because some of the policies existing in the countries chosen for the case studies give preferential treatment to migrants with a particular ethnic background (for instance the "бесарабски българи" (besarabski bulgari) whom are considered to be Ukrainians of Bulgarian origin), which is important with regards to the project findings.

During the informed consent procedure, both the participants in the focus groups and the ones who gave interviews were informed that their data would be anonymised, protected during the project and destroyed at the end of the research. The recordings were kept until the end of the PhD project, in case some of the data in the transcribed files had to be verified. All the data that was collected through audio recording was done with the permission of respondents (interviews, focus groups and their transcription) and it was subsequently encrypted and stored on a USB flash drive and a cloud. Once gathered, the data was subsequently anonymised. The data was safely stored in password protected storage devises and/or encrypted files at the UM servers. Only the principal researcher, the research

166 The voucher in Bulgaria amounted to 30 BGN (Apr. 15 EUR) and the voucher in Poland amounted to 40 PLN (Apr. 9.50 EUR). The field research in Poland was conducted after the research in Bulgaria and the difference between the vouchers was due to the fact that this was the standard amount offered to respondents by the Centre of Migration Research, Warsaw.

assistants and the supervisors had access to the data. The procedures on destruction or re-use followed the guidelines that were given by the EAB.

1.6. Scope

Since the main focus of this study is on the developed circular migration policies through the EU legal migration instruments and policy instruments within the GAMM, it excludes from its scope any other EU legislation, which does not have bearing to the EU's approach to circular migration in the context of the Eastern partnership neighbourhood. This dissertation excludes form its scope any EU law or national provisions that explicitly cover international students, posted workers, EU citizens and their EU or third-country family members. Circular mobility of posted workers and intra-EU mobility as provided by the Blue Card Directive and the ICT Directive are excluded from the scope of this dissertation because it is an implementation study focusing on EU's approach to circular migration which currently does not include these types of circular migration facilitation.

The EU internal market standards, as well as the standards developed at the international and European level, are analysed only for the sake of employing them as benchmarks and for providing an assessment of the circular migration policies against these aspirational targets. Therefore, when discussing the rights of migrant workers, the dissertation considers only the rights listed as benchmarks in Chapter 3 and Annex V. These benchmarks focus on the rights of migrant workers in the context of circularity. Therefore, they exclude employment rights and conditions. However, since this policy area is considered pertinent and intertwined with the rest of the policy issues at stake with circular migration, the empirical parts of Chapters 6 and 7 highlight some of the problems registered in this regard. The study also excludes the General Agreements on Trades and Services, since they are not considered an inherent part of the EU's approach to circular migration.

The focus of the Bulgaria and Poland chapters is on the developed legislation and specific instruments pertinent to circular migration and the transposition of the EU instruments, listed in the aforementioned six policy areas, in the context of the Eastern neighbourhood. Therefore, any other legislation is considered to be outside the scope of this study.

This dissertation also excludes, from its empirical analysis, any third-country nationals who have acquired either the Polish or Bulgarian nationality, as well as

dual citizenship holders. However, taking into consideration the fact that migrants usually change from one status to another during their lifetime, migrants who had entered as students or family migrants and then became or were planning to become engaged in labour migration were covered by the profile of the focus groups.

1.7. Structure

The dissertation is structured as follows. Chapter 2 presents the post-war experience with foreign labour recruitment programmes in several West European countries, the United States and South Africa in order to extrapolate their common features. After demonstrating the consequences of the implementation of these models in the post-war period, this chapter touches upon the EEC-Turkey Association Agreement. The final section presents the new generation of policies that aim to facilitate temporary and/or circular migration. This chapter aims to illustrate that the policy idea of foreign labour recruitment is not new and to outline the challenges that are associated with these types of policies.

Chapter 3 develops the analytical framework of this study on the basis of a review of the existing universal and regional human rights standards, as well as the EU internal market provisions that serve as aspirational targets for the management of circular migration. This chapter also maps the policy elements that are conducive to successful circular migration management, based on a literature review of the lessons learned from the application of similar time-bound labour migration policies, such as the guest worker schemes, and good practices that are identifiable among the emerging new generation of circular migration programs.

Chapter 4 presents the development of the circular migration concept at the international and at the European level. Firstly, it reviews the policy documents of the United Nations, the World Bank, the International Organisation for Migration (IOM), the Global Commission on International Migration and the Global Forum on Migration and Development, in order to conceptualise the term and to trace how it was transferred to the EU level. Secondly, it examines the genesis of circular migration in the EU's immigration policy by looking at the main policy developments and the adopted legal acts since the Tampere programme, as well as including interviews with EU level actors that have a bearing on this topic. Finally, it presents the concept in the context of the Eastern Partnership, as well as in the GAMM by looking at different legal and policy instruments, such as Mobility

Partnerships, visa facilitation agreements and dialogues, and their implementation on the basis of interviews conducted with different stakeholders.

On the basis of the analytical framework that is developed in Chapter 3, Chapter 5 provides an assessment as to what extent the EU legal instruments that incorporate circular migration elements can foster rights-based circulation. Chapters 6 and 7 examine the implementation of the EU's approach to circular migration in Polish and Bulgarian legislation and policy and assess the current challenges and obstacles with regards to the rights of migrant workers coming from the Eastern Partnership countries. These two chapters present the developed EU and national instruments and analyse the implementation of these instruments on the basis of the empirical data gathered through nine focus groups with migrant workers and Blue Card holders, as well as interviews that were conducted with the relevant stakeholders at the national level.

Finally, Chapter 9 provides a comparative analysis between the developed circular migration instruments on the basis of EU and national law in Bulgaria and Poland. The chapter evaluates the developed policies against the standards developed at the international and at the European level that have been taken as aspiration targets and concludes with an assessment of the feasibility of rights-based circular migration for migrant workers that are willing to engage in "mobility back and forth between two countries".[167]

167 European Commission, 'Communication on circular migration and mobility partnerships between the European Union and third countries', COM (2007) 248 final, Brussels, 16 May 2007, p. 8.

CHAPTER 2:

International experience of regulated temporary recruitment of foreigners

2.1. Introduction

Despite the existence of a rich body of academic literature on temporary foreign labour recruitment policies, this chapter presents the post-World War II experiences of several Western European countries, the U.S. and South Africa in order to illustrate their common features and to emphasise that this policy approach is nothing new. After demonstrating the issues that are related to the rights of guest-workers and consequences of the implementation of these models in the post-war period, this chapter touches upon the EEC-Turkey Association Agreement. The final section presents the new generation of foreign labour recruitment policies that aim to facilitate temporary and/or circular migration and the problems that are at stake when it comes to the rights of migrant workers.

2.2. Guest-worker policies in European countries

The temporary recruitment of foreign workers has been one of the driving forces of the industrialised world for centuries, examples of which include the use of Chinese labour in Malaya and in the Dutch West Indies, and the migrant labour systems in Southern Africa.[1] In Europe, its historical roots can be traced back to the second half of the nineteenth century when "foreign Poles" were recruited as coalminers by "recruiting sergeants" to work in the Ruhr valley due to the expanding mining and modern iron foundries. They were also needed as seasonal agricultural workers in Eastern Prussia in order to fill the vacuum that was created by departing natives and the rise in the demand for the labour-intensive sugar beet

1 S. Castles, 'The Guest-Worker in Western Europe - An Obituary', *International Migration Review,* 20/4 (1986), p. 761. For more details, see L. P. Moch, *Moving Europeans: migration in Western Europe since 1650* (2nd edn.; Bloomington Indiana University Press, 2003), pp. 124-125.

culture. Such temporary recruitment systems were developed in Germany, France and Switzerland in the period between 1870 and 1914 and they were designed so as to not allow migrant workers to permanently settle in the host country.[2] Despite all the restrictive measures that were put in place to keep migrants in a temporary position,[3] migrants nevertheless settled in the host countries.[4]

The temporary recruitment of foreign workers was a also common feature in all highly industrialised Western European countries in the post-World War II era up until the *Oil crisis* (1945-1973), and it was salient that West Germany had the most developed apparatus for recruiting guest-workers. [5] Due to the reconstruction efforts that took place after the war and the economic boom in the post-war period, Western Europe faced increasing labour shortages and certain countries subsequently adopted a strategy to import foreign workers to fill this gap. Prior to that, state regulation and control over labour migration flows were relatively unusual.[6] Fears that mass unemployment, like that which was seen during the Great Depression, would take place again meant that Western European countries perceived future migration as a temporary means of complementing indigenous workers.[7] They expected that if another recession were to take place, then the migrant workers would return back to their countries of origin, as most had already done throughout the 1930s.

Due to the fact that Switzerland remained neutral during World War II, it was the first country to recruit guest workers after 1945.[8] The Swiss government established a guest-worker system that controlled the admission and residence conditions for foreign workers and employers recruited foreign workers, predominantly

2 Castles, 'The Guest-Worker in Western Europe - An Obituary', p. 761.
3 Moch, *Moving Europeans: migration in Western Europe since 1650*, p. 125. S. Castles, H. D. Haas, and M. J. Miller, *The Age of Migration. International Population Movements in the Modern World* (Fifth edn.: Palgrave Macmillan, 2014), p. 94.
4 Castles, 'The Guest-Worker in Western Europe - An Obituary', p. 761.
5 Castles, Haas, and Miller, *The Age of Migration. International Population Movements in the Modern World*, p. 104, p.106.
6 L. P. Moch, 'Dividing Time: An Analytical Framework for Migration History Periodization', in J. Lucassen and L. Lucassen (eds.), *Migration, Migration History, History – Old Paradigms and New Perspectives* (Peter Lang 1997), p. 55.
7 P. L. Martin and M. J. Miller, 'Guestworkers: Lessons from Western Europe', *Industrial and Labour Relations Review,* 33/3 (1980), p. 316.
8 P. Martin, 'Managing Labor Migration: Temporary Worker Programs for the 21st Century', (2006), p. 33.

from Italy, under an agreement that was concluded in 1948.[9] In the beginning, the system was very restrictive as it only aimed to ensure the "rapid turnover of foreign workers" and efforts were undertaken so as to prevent them from settling in Switzerland.[10] Furthermore, the admission of dependents was very limited and the residence permits that were issued to migrants could be withdrawn very easily.[11] Switzerland also recruited seasonal workers (*Saisonniers)* for up to nine months a year.[12] After the expiration of this period, they could re-apply again the next year if the employer was still interested in recruiting them.[13]

The increasing competition for labour in Western Europe, as well as the need for a more stable workforce, led to the liberalisation of the Swiss system: the *Jahresaufenthalter,* who were migrants that were granted contracts for one year, were allowed to bring their dependents after they had worked in Switzerland for more than three years.[14] Finally, foreign workers of certain nationalities who had renewed their contracts five times without any interruptions (ten years in total) were entitled to possess the *Niedergelassene* status on the basis of "establishment permits", which had the effect of granting more security to the workers as well as labour market mobility rights.[15] The Italian-Swiss agreement was amended in 1964 so as to give more rights to Italian workers, including the right to have their families join them in Switzerland.[16] Furthermore, it provided an opportunity for seasonal workers to obtain annual residence permits after they had worked in Switzerland for five consecutive seasons.[17] In the early 1960s, the OECD recommended a temporary migration model based on the Swiss guest-worker system.[18]

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9 Castles, 'The Guest-Worker in Western Europe - An Obituary', p. 766. D. Thränhardt, 'Europe- A New Immigration Continent. Policies and Politics since 1945 in Comparative Perspective', in D. Thränhardt (ed.), *Europe- A New Immigration Continent: Policies and Politics in Comparative Perspective* (LIT Verlag, Münster 1996a), p. 33.

10 Castles, 'The Guest-Worker in Western Europe - An Obituary', p. 766.

11 S. Castles, 'The guest-worker in Western Europe: an obituary' (1986), *International Migration Review*, vol. 20, No 4, Special Issue, Temporary worker, p. 767

12 Thränhardt, 'Europe- A New Immigration Continent. Policies and Politics since 1945 in Comparative Perspective', p. 36.

13 Ibid.

14 Castles, 'The Guest-Worker in Western Europe - An Obituary', p. 766. Thränhardt, 'Europe- A New Immigration Continent. Policies and Politics since 1945 in Comparative Perspective', p. 36.

15 Thränhardt, 'Europe- A New Immigration Continent. Policies and Politics since 1945 in Comparative Perspective', p. 36; Castles, 'The Guest-Worker in Western Europe - An Obituary', p. 766.

16 See T. Liebig, 'Switzerland's Immigration Policy: Lessons for Germany?', Uni St Gallen, Forschungsinstitut für Arbeit und Arbeitsrecht FAA-HSG. DP 76, (2002).

17 Castles, 'The Guest-Worker in Western Europe - An Obituary', p. 767.

18 Thränhardt, 'Europe- A New Immigration Continent. Policies and Politics since 1945 in Comparative Perspective', p. 38.

As Thränhardt stresses, the Swiss government also took the lead in terminating these schemes.[19] It ended the recruitment programme in 1970 during a period of economic expansion and it subsequently started to introduce restrictions on labour migration. The Swiss Federal Council established yearly residency permit quotas for each Canton.[20] The early 1980s saw the stabilisation of the immigrant population with an increasing share of economically inactive dependents.[21]

Due to "the population problem" after the war, the French government also began to recruit foreign workers through its newly established *Office National d' Immigration* (ONI).[22] It was estimated that France needed between one and five million immigrants in order to overcome the post-war population deficit.[23] Bilateral agreements were concluded with Southern European countries, e.g., two were signed with Italy in 1946 and 1951 respectively, and a recruitment agreement with Greece was signed in 1954.[24] If French employers needed to recruit foreign workers, they had to make a request to the ONI and pay a fee, and it organised the recruitment and the travel of the migrant workers.[25] As a result of the low birth rates in the country, the French government envisaged an option for family migration and it officially encouraged permanent migration as a repopulation strategy.[26]

France also experienced the spontaneous migration of individuals on tourist visas and without passports who came to work individually as a result of the lack of capacity of ONI to meet employers' needs.[27] After finding a job, they were, in most cases, *post facto* regularised. These individuals mainly came from Spain and Portugal, and later on from Turkey and Yugoslavia. At the same time, citizens of the former and present French colonies were able to freely enter France until the late 1960s, which additionally contributed to the problem of uncontrolled immigration.[28] In 1974, the French government decided to restrict the entry of migrant workers and their dependents in light of the *Oil crisis* and also because West Germany decided to curtail its labour migration schemes. The latter proved to be impossible due to practical and legal reasons.

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19 Ibid., p. 40.
20 Martin and Miller, 'Guestworkers: Lessons from Western Europe', p. 317.
21 Castles, 'The Guest-Worker in Western Europe - An Obituary', p. 767.
22 S. Collinson, *Europe and International Migration* (Pinter Publishers/Royal Institute of International Affairs, London 1993), p. 47.
23 Ibid.
24 Ibid., p. 48.
25 Castles, 'The Guest-Worker in Western Europe - An Obituary', p. 763.
26 Martin and Miller, 'Guestworkers: Lessons from Western Europe', p. 316.
27 Castles, 'The Guest-Worker in Western Europe - An Obituary', p. 763.
28 Ibid.

In 1945, the UK Labour Government organised several labour migration schemes. The largest was the European Voluntary Worker scheme, which offered European refugees living in camps in Germany and Austria work-specific occupations in the UK.[29] These migrants were tied to a job that was selected for them by the British Ministry of Labour, initially on the basis of a one-year contract, and they could easily be deported if they misbehaved or became ill.[30] The eligible migrant workers were young single men who did not have a right to permanent residence and their civil rights were extremely limited.[31] In 1950, the British government decided that after three years of residence, these workers could enter the labour market on the same terms as British citizens.[32] The scheme was small scale and it only operated until 1951 because Britain was able to rely on other labour sources, primarily from its colonies.[33]

A recruitment scheme known as the *Contingentensysteem*, which was based on bilateral agreements, operated in Belgium in the post-war period. Workers were recruited mainly from Southern Europe and were obliged to work in the coalmines and in the iron and steel industry.[34] The system was of a much more liberal character and the recruited workers had the opportunity to bring their families along with them, which in turn led to the permanent settlement of many of these individuals. The recruitment scheme functioned until 1963, but this did not cause labour migration to end. Belgium's economic growth attracted foreign workers from Italy, Spain, Turkey and Morocco who continued to arrive "as tourists" and once they found a job in Belgium, they were granted work and residence permits.[35] The recruitment of foreign workers, except for EU workers, was brought to an end in 1974 by a decision of the Belgian government. However, due to the liberal family reunification regime, the migration of dependents continued well after 1974.[36]

The German model was notable for both its scale and its administrative and legal framework. It started to operate in the mid-1950s, drawing on the examples of the other European countries and Germany's historical experience with foreign

29 R. Miles and P. Cleary, 'Britain - Post-Colonial Migration in Context', in D. Thränhardt (ed.), *Europe- A New Immigration Continent: Policies and Politics in Comparative Perspective* (LIT Verlag, Münster 1996), pp. 158-159.
30 Ibid., p. 159.
31 Castles, 'The Guest-Worker in Western Europe - An Obituary', p. 762.
32 Miles and Cleary, 'Britain - Post-Colonial Migration in Context', p. 159.
33 For a more detailed review, see ibid., pp. 158-171.
34 Castles, 'The Guest-Worker in Western Europe - An Obituary', p. 762.
35 Ibid., p. 763.
36 Ibid., p. 762.

labour recruitment.[37] The emergence of the German guest-worker policy in the post-war period commenced on the basis of a Treaty that was signed with Italy in 1955 for the recruitment of several thousand Italian farmworkers.[38] According to the system, the foreign workers were to be used as *temporary labour units*[39] and they were to be returned in case the employers no longer needed them.[40] This reflected the German policy notion that guest worker employment should be linked to the demands of the labour market and the economic conditions.[41] A principle of rotation (*Rotationsprinzip*) was promulgated so as to ensure the replacement of the migrant labour force on a regular basis.

As in the case of France, a governmental agency was in charge of recruiting foreign workers. The *Bundesanstalt für Arbeit* (Federal Labour Office, BfA) had German recruitment commissions in the sending countries and workers were recruited, on the basis of bilateral agreements, from the following countries: Italy (1955), Spain and Greece (1960), Turkey (1961), Morocco (1963), Portugal (1964), Tunisia (1965) and Yugoslavia (1968).[42] Employers had to apply to the BfA and pay a fee if they wished to recruit foreign workers.[43] The BfA organised the recruitment – testing the skills of the migrant workers, checking their police records and health and organised their transport to West Germany. At first, the BfA recruited foreign workers for jobs in the agriculture and construction sectors. Subsequently, they were also employed in low-skilled industrial positions. The employer had full control over the worker's status from recruitment to deportation. As was the case in the other highly industrialised countries, the permanent settlement of foreign workers was not envisaged by the German government.

The ILO Migration and Employment Convention (No. 97)[44] served as the basis for the development of the West German labour recruitment agreements.[45] The

37 Castles, 'The Guest-Worker in Western Europe - An Obituary', p. 768.
38 Thränhardt, 'Germany - An Undeclared Immigration Country', p. 203.
39 Martin and Miller, 'Guestworkers: Lessons from Western Europe', p. 316.
40 See also K. Huhn, 'Arbeitsplaz Deutschland, Heimat Türkei? Die Anwerbung von Arbeitskräften aus der Türkei im Kontext der bundesdeutschen Ausländerbeschäftigungspolitik. Ein Policy Paper mit Empfehlungen für die künftige Gestaltung der Zuwanderung im Auftrag der Bertelsmann Stiftung', (2011), p. 24.
41 Castles, Haas, and Miller, *The Age of Migration. International Population Movements in the Modern World*, p. 107.
42 Martin and Miller, 'Guestworkers: Lessons from Western Europe', p.317.
43 Castles, 'The Guest-Worker in Western Europe - An Obituary', p. 768.
44 Migration and Employment Convention (Revised), C097, adopted at 32nd ILC session on 01 July 1949, Geneva, entry into force on 22 January 1952. For more details, see Chapter 3.
45 H. Knortz, *Diplomatische Tauschgeschäfte. "Gastarbeiter" in der westdeutschen Diplomatie und Beschäftigungspolitik 1953-1973* (Böhlau Verlag Köln, 2008), p. 24. See Article 10 of the ILO Convention.

1965 West German Law on foreigners (*Ausländergesetz)* provided basic guidelines for determining guest-workers status in relation to: the granting of an initial residence permit and possibilities for extension; the granting of a "right to residence" status; the revocation of permits and expulsion.[46] According to paragraph 6 of the Federal administrative guidelines for the implementation of the Law on foreigners: "Foreigners enjoy all basic rights, except the basic rights of freedom of assembly, freedom of association, freedom of movement and free choice of occupation, place of work and place of education, and protection from extradition abroad". [47] A prerequisite for granting a residence permit to a guest worker was the availability of suitable housing, which was also required in all recruitment treaties. From 1965 to 1978, foreigners who were legally residing in Germany for an uninterrupted period of five years obtained the right to receive a permanent residence permit (*Aufenthaltsberechtigung*), if they were able to fulfil the following three requirements: possession of a special work permit; knowledge of the German language and access to suitable housing. [48]

In line with the amendments to the agreement between West Germany and Turkey that took place in 1964 and the issued "Basic principles of the policy towards foreigners", the Ministry of Interior applied restrictions on the migration of family members.[49] According to the official policy, family migration could be permitted after a migrant worker had spent a minimum of three years in Germany. It was considered that family migration brought financial costs and social burdens to local communities. Therefore family migration could only take place for "valuable" migrant workers with long-term employment prospects in West Germany, who were capable of fitting into the conditions of the local life.[50] This policy

46 Note, 'The Legal Rights of Guestworkers: The Case of West Germany', *Columbia Journal of Transnational Law,* 24/2 (1986), p. 317.

47 S. Castles, "The Guests Who Stayed – The Debate on "Foreigners Policy" in the German Federal Republic" in *International Migration Review* (1985), Vol. 19, No. 3, Special Issue: Civil Rights and the Sociopolitical Participation of Migrants, p. 522.

48 Ibid. In 1978, the time limit was changed from five to eight years of uninterrupted residency in West Germany. In D. K. Matsis, 'Guestworker Policies and Apartheid: Does One Resemble the Other?', *Marquette Law Review,* 74/3 (1991), p. 528.

49 Huhn, 'Arbeitsplaz Deutschland, Heimat Türkei? Die Anwerbung von Arbeitskräften aus der Türkei im Kontext der bundesdeutschen Ausländerbeschäftigungspolitik. Ein Policy Paper mit Empfehlungen für die künftige Gestaltung der Zuwanderung im Auftrag der Bertelsmann Stiftung', p. 24.

50 Ibid.

was liberalised over the years[51] and led to settlement of many foreign workers in Germany before the ban on the admission of non-EU workers in 1973. What should be stressed, however, is that 75% of the 18.5 million foreigners who were guest-workers in Germany left the country between 1960 and 1973.[52]

The Netherlands was primarily an emigration-country for the first few decades after 1945.[53] The country witnessed spontaneous migration as a consequence of the ongoing decolonisation process, which saw an influx of persons from Indo-Dutch origin, as well as Moluccans who had served in the Dutch colonial army, and later on, migrants from Suriname as a result of the country's independence in the mid-1970s.[54] Strong economic recovery in the Netherlands created a growing demand for foreign labour in labour intensive sectors such as mining, steel, ship-building and textiles.[55] Therefore, at the beginning of 1960s, the Netherlands started to recruit guest workers as a policy response to these labour shortages. Initially, companies had to carry out the actual recruitment and settlement process, but as the scheme developed, the Dutch government subsequently became involved.[56] The recruitment was facilitated on the basis of bilateral agreements that were gradually concluded with Italy, Spain, Portugal, Turkey, Greece, Morocco, Yugoslavia, as well as Tunisia, and through the establishment of recruitment agencies.[57]

Guest workers had to obtain a temporary residence permits, which in turn had to be renewed every year in order to supposedly allow for adjustments to the demands of the labour market,[58] and they were obliged to return home when they were no longer needed. Undocumented "spontaneous guest workers" were not

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51 See Matsis, 'Guestworker Policies and Apartheid: Does One Resemble the Other?', p. 531. See also Huhn, 'Arbeitsplaz Deutschland, Heimat Türkei? Die Anwerbung von Arbeitskräften aus der Türkei im Kontext der bundesdeutschen Ausländerbeschäftigungspolitik. Ein Policy Paper mit Empfehlungen für die künftige Gestaltung der Zuwanderung im Auftrag der Bertelsmann Stiftung', p. 26.

52 E. Hönekopp, 'Labour Migration to Germany from Central and Eastern Europe - Old and New Trends', IAB Labour Market Research Topics, (1997), p. 1.

53 K. Groenendijk and R. Hampsink, *Temporary Employment of Migrants in Europe* (Reeks Recht & Samenleving, 10: Nijmegen, Katholieke Universiteit, Faculteit der Rechtsgeleerdheid, 1995), p. 53.

54 P. Muus, 'The Netherlands: A Pragmatic Approach to Economic Needs and Humanitarian Considerations', in W. A. Cornelius et al. (eds.), *Controlling Immigration. A Global Perspective* (Second edition edn.: Stanford University Press 2004), p. 263. A. Wiesbrock, *Legal Migration to the European Union* (Leiden: Brill/Nijhoff, 2010), p. 47.

55 Groenendijk and Hampsink, *Temporary Employment of Migrants in Europe*, p. 53.

56 J. Rath, 'The Netherlands: A reluctant country of immigration', *Journal of Economic and Social Geography* 100/5 (2009), p. 677.

57 Castles, 'The Guest-Worker in Western Europe - An Obituary', p. 765; Rath, 'The Netherlands: A reluctant country of immigration', p. 677.

58 J. Lucassen and R. Penninx, *Newcomers: Immigrants and their Descendants in the Netherlands 1550-1995* (Transaction Publishers 1997), p. 70.

discouraged and they could obtain a permit upon securing a job.[59] The fact that the labour migration was considered to be temporary resulted in strict family reunion regulations.[60] Even though these migrant workers were supposed to stay on a temporary basis, over time they became "economically indispensible", as they were employed in jobs that Dutch workers were not interested in taking.[61] The informal end of this type of recruitment in 1973, as was the case in the other Western European countries, provided an additional incentive for temporary migrants to settle and bring their family members to the Netherlands.[62]

In the post-war period, Austria also faced labour shortages due to a prolonged period of economic growth, the diminishing industrial workforce in the country and the low labour participation of women.[63] Compared to other Western European countries, labour shortages in Austria became a noticeable hindrance to its economic growth only relatively late on. Under the existing foreign workers regulations that were applicable at that time, if an Austrian company wanted to hire a foreign worker, the company had to prove that there were not any available domestic workers for a particular work place.[64]

Due to the resistance of the Austrian trade unions, the first recruitment agreement, which did not envisage a labour market test, was concluded in 1961. A total of 47 000 foreign workers were recruited on the basis of the so-called *Raab-Olah* Agreement. Migrant workers had the same wage and working conditions as domestic workers and they were initially admitted only for a period of one year. Their residence permit was bound to their existing employment. The marginal level of labour migration, amounting to 37 000 workers for the period 1962-65, influenced the Austrian government's decision to conclude additional agreements for the recruitment of foreign workers.[65] In 1962, the first labour recruitment treaty was signed with Spain, followed by agreements with Turkey in 1964 and Yugoslavia in 1966. The Federal Economic Chamber recruited mainly young male workers through its offices abroad. 1970 marked an increase in the employment rates of foreign workers, which in 1973 already amounted to 8.7 % of the overall

59 Rath, 'The Netherlands: A reluctant country of immigration', p. 677.
60 M. a. Bruquetas-Callejo et al., 'Policymaking related to immigration and integration. The Dutch Case', *IMISCOE Working Paper,* 15 (2007), p. 8.
61 Castles, 'The Guest-Worker in Western Europe - An Obituary', p. 765.
62 Muus, 'The Netherlands: A Pragmatic Approach to Economic Needs and Humanitarian Considerations', p. 264. Groenendijk and Hampsink, *Temporary Employment of Migrants in Europe*, p. 53.
63 R. Bauböck, 'Nach Rasse und Sprache verschieden. Migrationspolitik in Österreich von der Monarchie bis heute', Reihe Politikwissenschaft, 31, Institut für Höhere Studien, Wien, (1996), p. 12.
64 Ibid.
65 Ibid., p. 13.

employment rates.[66] As in most of the Western European countries at the time, the temporary recruitment and the rotation system failed to achieve their policy purpose and the inclusion of a family reunification regime marked the scheme's transition from a guest-worker policy to an immigration policy.

In the post-war period, the Scandinavian countries relied primarily on the intra-Nordic movement of labour, which was formalised on the basis of the Passport Union that was set up between Denmark, Sweden, Finland, Iceland and Norway in 1954.[67] It provided for a common labour market, abolishing restrictions for citizens of the Nordic countries to move freely and seek work without the need to obtain a work or residence permit.[68] The recruitment of foreign workers first commenced in Sweden, which was later joined by Denmark and Norway.[69]

Due to the flourishing export industry, Sweden experienced a constant labour shortage at the end of the 1940s and in the early 1950s, which forced large companies to actively recruit workers from Italy.[70] After the conclusion of the Passport Union Treaty, Sweden also recruited Finnish workers on a much larger scale.[71] The labour recruitment was implemented through the Swedish Labour Market Board that cooperated with the relevant authorities in the sending countries or directly with the companies that were in need of foreign labour.[72] In the period 1947-48, Sweden concluded bilateral recruitment agreements with Italy, Hungary, the British and American occupational forces in Austria, as well as with Greece, Yugoslavia and later on, with Turkey.[73] Spontaneous migration also took place due to fact that the Swedish immigration regime was poorly enforced, thereby allowing migrants to come on a tourist visa and look for a job on the spot.[74] Restrictions were eventually enforced in 1967, which required non-Nordic citizens to acquire a work permit before their arrival and only after the performance of labour market test.[75] Companies, however, continued to recruit foreign workers. As a result of the *Oil crisis*, migrant labour recruitment was curtailed in

66 Ibid.
67 Wiesbrock, *Legal Migration to the European Union,* p. 64.
68 C. Westin, 'Immigration to Sweden 1940-1990 and the Response of Public Opinion', *A European Journal of International Migration and Ethnic Realtions,* 2/18 (1993), p. 148.
69 Thränhardt, 'Europe- A New Immigration Continent. Policies and Politics since 1945 in Comparative Perspective', p. 40.
70 Westin, 'Immigration to Sweden 1940-1990 and the Response of Public Opinion', p. 148.
71 Ibid.
72 Wiesbrock, *Legal Migration to the European Union,* p. 65.
73 For more details in English, see ibid.
74 Ibid., pp. 65-67.
75 B. Ornbrandt, 'Sweden', in S. Angenendt (ed.), *Asylum and Migration Policies in the European Union* (Bonn: Europa Union Verlag, 1999), p. 312.

1972 as a result of pressure from the Swedish Trade Unions Confederation.[76] In later years, the government and the trade unions opposed new temporary employment of migrants from non-Nordic countries with a few exceptions in relation to highly-skilled migrants, asylum seekers and students performing summer jobs.[77]

By the late 1960s, the domestic labour force was insufficient for Denmark's growing economy. Therefore, the government took the decision in 1967 to allow businesses to recruit foreign workers.[78] The Aliens Act of 1952 provided for a wide discretion, which allowed "ample opportunity" for foreigners to move to Denmark, find a job and then apply for a work permit.[79] Therefore, migrants came partially on their own initiative and partially as a result of Danish employers.[80] In the period between 1960 and 1973, Denmark recruited migrant workers from Turkey, Morocco, Yugoslavia and Pakistan.[81] Due to the rising number of foreigners and the fear of unemployment, the legislation that regulated entry into Denmark was made more restrictive over the years[82] until 1973 when a complete ban on all immigration was introduced.[83]

2.3. Guest-worker policies outside Europe

The American Bracero Programme was based on temporary worker arrangements with Mexico. It was established in 1942 in California, and it was a response from the U.S. government to requests that were made by South-Western agricultural growers, who lobbied for the recruitment of foreign labour.[84] Both sides feared that the existing labour force would not be sufficient to harvest the crops during the war.[85] Therefore the programme was designed to serve as a wartime relief programme until 1964. The Ministry of Agriculture managed the administration of the programme, which covered 30 U.S. states. The executive agreement on farm

76 Westin, 'Immigration to Sweden 1940-1990 and the Response of Public Opinion', p. 149.
77 Groenendijk and Hampsink, *Temporary Employment of Migrants in Europe*, p. 71.
78 J. Hjarnø, 'Denmark', in S. Angenendt (ed.), *Asylum and Migration Policies in the European Union* (Bonn: Europa Union Verlag, 1999), p. 112.
79 S. Pedersen, 'Migration to and from Denmark during the period 1960-97', in D. Coleman and E. Wadensjö (eds.), *Immigration to Denmark - International and National Perspectives* (Aarhus University Press 1999), pp. 151-152.
80 Hjarnø, 'Denmark', p. 112.
81 For more details, see ibid.
82 Pedersen, 'Migration to and from Denmark during the period 1960-97', pp. 152-153.
83 Ibid., p. 153.
84 R. L. Mize, 'Mexican Contract Workers and the U.S. Capitalist Agricultural Labor Process: The Formative Era, 1942–1964', *Rural Sociology* 71/1 (2006), p. 86.
85 O. M. Scruggs, 'Texas and the Bracero Program, 1942-1947', *Pacific Historical Review,* 32/3 (1963), p. 251.

labour that was concluded between the U.S. and Mexican government amongst other things provided that: Mexicans entering the U.S. under the provisions of the agreement would not be subjected to discriminatory treatment; that they would be guaranteed transportation and living expenses in line with Mexican labour laws and that Mexicans entering under the agreement would not be employed either to displace domestic workers or to reduce their wages.[86]

The agreements were very poorly enforced in practice, which consequently led to violations of the workers' rights.[87] One of the reasons for that phenomenon was the relaxation of the restrictions on the admission of contract workers, which left control in the hands of the farmers.[88] From 1955 to 1959, on average, 480 000 braceros worked in the U.S. annually, which amounted to 18% of the overall seasonal farm force.[89] Due to this existing legal channel for the circular flow of migrants, irregular migration was "virtually non-existent" between 1953 and 1963.[90] This changed in 1965 when the US Congress terminated the programme because it was regarded as being exploitative. This brought the orderly channel for legal migration to an end and in turn this had the effect of triggering mass irregular migration.[91]

Canada employed veterans and displaced persons as contract agricultural workers in the post-World War II period and when these sources of labour were no longer available, agricultural employers started to recruit international migrants, many of whom did not have a legal status.[92] In the late 1960s, Canada institutionalised the recruitment of migrants as part of a new immigration policy framework.[93] The Seasonal Agricultural Workers Program (SAWP), which has been running for more than 40 years, was premised on bilateral agreements with Caribbean

86 J. R. García, *Operation Wetback : the mass deportation of Mexican undocumented workers in 1954* (Westport, Conn.: Greenwood Press, 1980), p. 24.

87 Mize, 'Mexican Contract Workers and the U.S. Capitalist Agricultural Labor Process: The Formative Era, 1942–1964', p. 86. For more details, see also M. Holley, 'Disadvantaged By Design: How the Law Inhibits Agricultural Guest Workers from Enforcing their Rights', *Hofstra Labor and Employment Law Journal,* 18/2 (2001).

88 Scruggs, 'Texas and the Bracero Program, 1942-1947', p. 251.

89 W. A. Grove, 'The Mexican Farm Labor Program, 1942-1964: Government-administered Labor Market Insurance or Insurance for Farmers', *Agricultural History* 70/2 (1996), p. 303.

90 D. S. Massey and P. A. Karen, 'Origins of the New Latino Underclass', *Race and Social Problems,* 4/1 (2012), p. 8.

91 Ibid., pp. 8-9. See also D. S. Massey and K. A. Pren, 'Unintended consequences of US immigration policy: Explaining the post-1965 surge from Latin America', *Population and Development Review,* 38/1 (2012).

92 K. Preibisch, 'Migrant Workers and Changing Work-place Regimes in Contemporary Agricultural Production in Canada', *International Journal of Sociology of Agriculture & Food,* 19/1 (2011), p. 66.

93 Ibid.

countries that were signed in the late 1960s and with Mexico in 1974.[94] In 1973, this programme became one of the low-skilled streams of Canada's first general temporary foreign worker programme, known as the Non-Immigrant Employment Authorization Program (NIEAP).[95] The second low-skill stream that was incorporated into the general programme mainly targeted female migrants whom would work as live-in domestics.[96] The NIEAP established "a new class of temporary resident tied specifically to non-permanent employment" and there were also restrictions on the right to change employer, employment and working conditions, as well as access to permanent residence.[97]

The South African Bantu Laws Amendment Act n°76 of 1961 institutionalised the recruitment of foreign workers through the establishment of labour bureaus in the so-called peripheral labour reserves - Lesotho, Mozambique, Swaziland, Botswana and Malawi.[98] Migrant workers were required for the South African mining industry that focused on the extraction of gold, diamonds and other minerals. According to the Amendment Act, the recruited workers were permitted to work primarily in the mining and agriculture sectors, and the employers were obliged to repatriate them upon the expiration of their contracts. The Act restricted the conditions of entry into South Africa for other forms of migration.[99]

All of the aforementioned foreign labour recruitment schemes have some features in common. The recruitment of migrant workers was based, in general terms, on the conclusion of bilateral agreements with the sending countries and the national legislation on entry, residence and work was utilised in order to regulate the inflow of guest-workers. Apart from that, the extent to which the state was involved in matters differed. Countries like France and Germany established administrative structures in order to facilitate the recruitment and transportation of migrants, as well as the establishment of migration control mechanisms in order to keep the guest workers in a temporary situation. Both throughout the time of operation of

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94 S. Castles and D. Ozkul, 'Circular Migration: Triple Win, or a New Label for Temporary Migration?', in G. Battistella (ed.), *Global and Asian Perspectives on International Migration* (Global Migration Issues; Switzerland Springer International Publishing, 2015), p. 36.

95 J. Fudge and F. MacPhail, 'The temporary foreign worker program in Canada: low-skilled workers as an extreme form of flexible labour', *Centre for Employment and Labour Relations Law, University of Melbourne* Working paper no. 45 (2009), p. 10.

96 Ibid., p. 11.

97 J. Foster, 'Making Temporary Permanent: The Silent Transformation of the Temporary Foreign Worker Program', *Just Labour. A Canadian Journal of Work and Society* 19 (2012), p. 24.

98 G. Tati, 'The immigration Issues in the Post-Apartheid South Africa: Discourses, Policies and Social Repercussions', *Espace Populations Sociétés* 3(2008), p. 424.

99 Ibid.

the schemes and after the halt of the active foreign labour recruitment, spontaneous migration - both legal and irregular – nevertheless continued.

Under most of the schemes under analysis, foreign workers were tied to a designated job until the regime was liberalised, due to country's dependency on foreign labour. All countries limited the social and political rights of foreign workers on the basis of the legal distinction between the citizen and the foreigner. Initially, most of the foreign workers did not have the right to family reunification, but they were subsequently able to bring dependents with them due to liberalisation of the family reunification legislation. At first, most of the guest-worker systems were designed to ensure the "rotation" of labour, i.e., the replacement of one worker by another upon the expiration of their contract.[100] However, many countries subsequently liberalised their regimes, which eventually led to the right to settle permanently.

2.4. Consequences of the guest-worker schemes in Europe

"Most of the 20th century guest-worker programmes had unexpected effects that were more important and long-lasting than their expected effects".[101] The notion of rotating foreign workers was recalibrated in light of humanitarian and economic considerations.[102] It transpired that it was impossible to keep migrants in a temporary situation by limiting the renewal of their permits, because this approach was seen as creating economic problems, a waste of training and adaptation time, as well as creating additional hurdles for the migrants whom were trying to integrate in European states. Despite the idea of foreign labour rotation, the guest-worker schemes did not function as effectively as expected according to the statistics – the net gain of 2.3 million migrants out of 17.2 million people gross inflow in Belgium, Germany, the Netherlands and Sweden in the period 1960-69 was perceived as being too high to the European governments that wished to see a zero net gain.[103]

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100 H. Zlotnik, 'Past trends in International Migration and their Implications for Future Prospects', in M.A.B. Siddique (ed.), *International Migration into the 21st Century. Essays in Honour of Reginald Appleyard* (Edward Elgar Publishing 2001), p. 234.

101 Martin, 'Managing Labor Migration: Temporary Worker Programs for the 21st Century', p. 3.

102 Martin and Miller, 'Guestworkers: Lessons from Western Europe', p. 320.

103 A. V. Oswald, K. Schönwälder, and B. Sonnenberger, 'Einwanderungsland Deutschland: A New Look at Its Post- War History', in R. Ohliger, K. Schönwälder, and T. Triadafilopoulos (eds.), *European Encounters. Migrants, Migration and European Societies since 1945* (Aldershot: Ashgate, 2003), p. 101.

By the mid-1970s, over eight million foreigners resided in north-west Europe – in Germany there were about 3 million, in France there were around 2.6 million, in the United Kingdom there were approximately 2 million, in Switzerland the figure was approximately 1.1 million, in Belgium the figure was around 700 000, in Sweden there were approximately 410,000 and in the Netherlands the figure stood at around 260 000.[104] The foreigners originated mainly from Portugal, Spain, Italy, Yugoslavia, Greece, Turkey, Tunisia, Morocco and Algeria.[105]

The economic recession of 1967-68 and the *Oil crisis* of 1973 impeded economic growth and caused increasing unemployment rates, which led most European states to limit foreign worker migration: something they were already trying to do through the enactment of restrictive immigration laws.[106] This was a consequence of the market driven approach that was chosen by most of these countries: the low-skilled workers that were recruited were no longer needed after the oil crises in the 1970s.[107] At this juncture, European governments introduced certain incentives for encouraging return migration, such as the payment of cash bonuses and the payment of pensions abroad.[108]

After the termination of their employment contracts, many migrants left the country. However, the limitations to new labour migration forced many foreign workers to permanently settle in the host countries due to concerns that they may not have been able to re-enter once they had left. They were able to settle as a result of the help of churches, NGOs, trade unions and pro-immigrant activists. In many cases, return was equated to de-skilling because it was very often the case that the newly gained skills were not required in their countries of origin.[109] Return migration was also associated with lowering of the standard of living and, in some cases, returning to politically and economically unstable countries of origin (e.g., Turkey and countries in North Africa).

The transformation from temporary migrants to permanent settlers consequently speeded up the process of reuniting those migrants with their spouses and dependent children. This process did not occur, however, without resistance from

104 K. J. Bade, *Europa in Bewegung. Migration vom späten 18. Jahrhundert bis zur Gegenwart* (Verlag C.H. Beck, 2000), p. 302.
105 Moch, 'Dividing Time: An Analytical Framework for Migration History Periodization', p. 54.
106 Bade, *Europa in Bewegung. Migration vom späten 18. Jahrhundert bis zur Gegenwart*, p. 316.
107 R. Hansen, 'Migration to Europe since 1945: Its History and its Lessons', *The Political Quarterly,* 74/s1 (2003), p. 34.
108 Zlotnik, 'Past trends in International Migration and their Implications for Future Prospects', p. 235.
109 Bade, *Europa in Bewegung. Migration vom späten 18. Jahrhundert bis zur Gegenwart*, p. 320.

national governments.[110] The national courts played a key role in facilitating family reunification, which enforced the right to the protection of family life. These developments also pertained to the European integration process and the "liberal paradox": based on the rule of law, liberal European states could not completely limit migration flows without violating their humanitarian obligations and human rights principles.[111] Despite their migrant status, guest-workers began to participate in political parties, trade unions and other such organisations, and were able to influence public affairs through various forms of social agitation.[112]

Family migration did not actually occur at high rates – it amounted, altogether, to 218 000 persons in Belgium, the Netherlands, Germany, Sweden and the UK for the first decade (1975-1985) after the introduction of foreign labour restrictions.[113] Despite that, it started to change the demographics of host societies and labour force participation rates. The idea behind a temporary foreign workforce was that guest workers would return in times of economic recession and thus the unemployment would be exported to their home countries.[114] This was not the case with newcomers - economically inactive family members caused higher unemployment rates than those resulting from migration from former colonies.

At the same time, the birth rates among the foreign population were almost always higher than that of the native population, which additionally contributed to the formation of multicultural societies in Europe.[115] Ethnic minority formation started to become visible and consequently, this triggered anti-immigrant sentiment across Western Europe.[116] Due to the fact that European governments wanted to foster temporary labour migration, no integration policies were promulgated and those that were introduced were generally regarded as being belated and inadequate. As was underlined by Castles, "Western European societies did not integrate immigrants as equals, but as economically disadvantaged and racially discriminated minorities".[117] As a result, segregated immigrant neighbourhoods with inferior living conditions were formed. Migrants were excluded from political participation, they remained poorly educated in general and they were dependent on social benefits from the hosting welfare states due to their lack

110 W. Seifert, 'Admission policy, patterns of migration and integration: the German and the French case compared', *New Community,* 23/4 (1997), p. 438.
111 Ibid.
112 Martin and Miller, 'Guestworkers: Lessons from Western Europe', p. 320.
113 Zlotnik, 'Past trends in International Migration and their Implications for Future Prospects', p. 235.
114 Bade, *Europa in Bewegung. Migration vom späten 18. Jahrhundert bis zur Gegenwart*, p. 322.
115 Hansen, 'Migration to Europe since 1945: Its History and its Lessons', p. 27.
116 Ibid.
117 Castles, 'The Guest-Worker in Western Europe - An Obituary', p. 743.

of employment. The 1980s were marked by the increase in extreme- right racist movements, periodic riots and unsuccessful policy attempts by Western European governments to solve the unpredicted social effects of the guest-worker schemes. Over the years, the guest worker programmes developed into immigration policies through a "humanising" process, which doomed their original policy aim of keeping migrants in a temporary position. [118]

2.5. EEC – Turkey Association Agreement

As was demonstrated in the previous sections of this chapter, collective labour recruitment in the post-Second World War period was regulated primarily through the conclusion of bilateral agreements. Many Member States of the then European Economic Community - that was established as a result of the entry into force of the Treaty of Rome in 1957 - were making use of the free access to each other's labour force in order to meet their industrial needs. According to Castles and Kosack, there were 495,000 foreign workers from other Member States who were employed in West Germany in 1966.[119] Initially, Western European countries that were in need of a labour supply would turn to Italy, Spain, Portugal and Greece. However, as the demand for labour as well as the competition between Western states continued to grow, their recruitment strategies shifted to other countries, such as: Turkey, Morocco, Tunisia and former Yugoslavia.[120]

Therefore, the labour recruitment agreements did not precede the inflow of migrants but rather it regulated and facilitated movements that were already taking place.[121] In this context it was no surprise that the Ankara Agreement on association,[122] establishing relations between the Community and Turkey – which was signed just two years after the bilateral agreement between Germany and Turkey

118 Martin and Miller, 'Guestworkers: Lessons from Western Europe', p. 328.
119 S. Castles and G. Kosack, *Immigrant Workers and Class Structure in Western Europe* (Institute of Race Relations, London 1973), p. 44.
120 A. Akgündüz, 'Labour Migration from Turkey to Western Europe (1960–1974). An Analytical Review', *Capital & Class,* 17/3 (1993), p. 156.
121 Ibid.
122 Agreement establishing an Association between the European Economic Community and Turkey (Ankara Agreement) signed in Ankara on 12 September 1963, OJ C133/24.12.1973.

– also contained references to the movement of workers.[123] Guild stressed that the regulation of the movement of EU (mainly Italians) and non-EU (mainly Turkish) workers was similar and that it was only after the "recruitment stop" in 1973 that differences between these two groups became salient, when the agreement and the developed implementing legislation manifested their policy impact.[124]

The Ankara Agreement was signed in 1963 as a mixed international agreement[125] and this was done in conformity with Article 238 EEC (now Article 217 TFEU). Its purpose was to lead to Turkey's eventual accession to the European Union through the strengthening of trade and economic relations between the EU and Turkey[126] and through the gradual establishment of a customs union.[127] Article 12 of the Ankara Agreement referred to Articles 48, 49 and 50 EC (now Articles 45, 46 and 57 TFEU) which showed the commitment of the contracting parties to progressively securing the free movement of workers.

The Ankara Agreement envisaged the establishment of an Association Council, which would have decision-making powers in order to attain the objectives of the agreement.[128] The Association Council would consist of a Minster for each Member States and a Minster representing the Turkish government. In 1970, an Additional protocol was signed, which stipulated the rules and timetables for the implementation of the Ankara Agreement and its transitional period.[129] It also

123 K. Eisele, *The External Dimension of the EU's Migration Policy. Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective* (Brill | Nijhoff, 2014), p. 228; E. Guild, *European Community Law From a Migrant's Perspective* (Kluwer Law International, 2000), p. 114. From the initial third country agreements, only the ones with Turkey (1963) and Greece (1961) included provisions relating to the movement of workers. They also provided for self-employed and service provision but these topics fall outside the scope of the current dissertation. In 1963, agreements were also concluded with 18 countries in Africa, the Caribbean and Pacific, referred to as the Yaoundé Agreement (later on called the Lomé Agreement). They did not include any labour provisions in its initial version, which were developed at a later stage during its second renegotiation. In 1969, the Maghreb Agreements were concluded but they did not include labour provisions until 1976 as a result of renegotiation. During the same year, the agreement with Yugoslavia was renegotiated so as to include identical provisions to the ones that were contained in the Maghreb agreements. For more details, see ibid.

124 Guild, *European Community Law From a Migrant's Perspective*, p. 114.

125 A mixed agreement means "any treaty to which an international organization, some or all of its Member States and one or more third States are parties and for the execution of which neither the organization nor its Member States have full competence". H. G. Schermers, "A Typology of Mixed Agreements," in Mixed Agreements, ed. D. O'Keeffe and H. G. Schermers (Kluwer, 1983), 25-26

126 Article 2.

127 Articles 2, 3, 4 and 5.

128 Articles 6, 22 and 23.

129 Additional Protocol and Financial Protocol, signed on 23 November 1970, annexed to the Agreement establishing an Association between the European Economic Community and Turkey and on measures to be taken or their entry into force, OJ L 293, 29.12.1972.

provided further provisions in relation to the free movement of workers in Title II thereof and more specifically in Articles 36 and 41 thereof. According to Article 36, it was stipulated that: "Freedom of movement for workers between Member States of the Community and Turkey shall be secured by progressive stages in accordance with the principles set out in Article 12 of the Agreement of Association between the end of the twelfth and the twenty-second year after the entry into force of that Agreement".[130]

The Association Council adopted several decisions, which were of significant importance for determining the rights of Turkish workers within the EU – Decision 2/76 on the implementation of Article 12 of the Ankara Agreement,[131] Decision 1/80 on the development of association dealing with the access of Turkish workers to the labour markets of the Member States and Decision 3/80 on the application of the social security schemes of the member States to Turkish workers and members of their families.[132] The Agreement and its Additional Protocols, as well as the following decisions of the Association Council, laid down the foundations for the evolution of the movement regime for Turkish workers and their dependents into the EU.[133] In addition, the Court of Justice of the European Union over time has considerably strengthened the legal position of Turkish nationals in the EU through its jurisprudence.[134]

130 The implementation date of 1996 was ultimately not met.

131 Association Council Decision 2/76, (1976) OJ L 265; Association Council Decision 1/80, (1981) OJ L 65; Association Council Decision 3/80, (1983) OJ C110.

132 T. Theele, 'Rights of Turkish Workers on the Basis of the EEC/Turkey Association Agreement', in H. Schneider (ed.), *Migration, Integration and Citizenship. A Challenge for Europe's Future* (II: Forum Maastricht, 2005), p. 145. Decision 1/80 replaced Decision 2/76 in 1980.

133 Eisele, *The External Dimension of the EU's Migration Policy. Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective*, p. 228.

134 K. Eisele, 'The Movement Regime of Turkish Citizens Based on the Ankara Association – An Ever-Growing Mosaic of Rights?', in H. Kabaalioglu, A. Ott, and A. Tatham (eds.), *EU and Turkey: Bridging the Differences* (Istanbul Economic Development Foundation, 2011), p. 33.

Since the agreement falls outside the scope of this study, only some of its key provisions are briefly presented in this section.[135] What is important for Turkish workers is Article 6 (1) of Decision 1/80, which states that "a Turkish worker duly registered as belonging to the labour force of a Member State: shall be entitled in that Member State, after one year's legal employment, to the renewal of his permit to work for the same employer, if a job is available". This worker is also entitled, after three years of legal employment, and subject to the priority that is given to other EU workers, to respond to another offer of employment, with an employer of his choice, made under normal conditions and registered with the employment services of the state, for the same occupation. In addition, Turkish workers have free access, in that Member State, to any paid enjoyment of their choice, after four years of legal employment have elapsed.

Article 7 of Decision 1/80 provides certain rights for the family members of Turkish workers who are "duly registered as belonging to the labour force of a Member State, who have been authorized to join him". They are entitled - again subject to the priority that is given to EU workers - to respond to any offer of employment after they have been legally resident for at least three years in that Member State and to enjoy free access to any paid employment of their choice so long as they have been legally resident in that Member State for at least five years. In addition, Article 10 provides a right to equal treatment in relation to working conditions. Finally, Article 13 contains a standstill provision on any new labour market access restrictions for those Turkish workers who are legally resident in the Member State and this extends to their family members.[136]

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135 For more details and the relevant case law of the Court, see D. Thym and M. Zoeteweij-Turhan (eds.), *Rights of Third-Country Nationals under EU Association Agreements. Degrees of Free Movement and Citizenship* (Leiden/Boston: Brill, 2015); A. Schrauwen and T. Vandamme, 'Preferential Treatment and the Standstill Clauses in the EU-Turkey Association Regime The Reconceptualization of European Union Citizenship', in E. Guild, C. G. Rotaeche and D. Kostakopoulou (eds.), T*owards a Citizenship of the Association? On the Future of Non-Discrimination (*Leiden/Boston: Brill, 2014), pp 89-109; K. Groenendijk, H. Hoffmann, M. Luiten, *Das Assoziationsrecht EWG/Türkei: Rechte türkischer Staatsangehöriger in der EuGH-Rechtsprechung*, (Baden-Baden: Nomos, 2013), A. Wiesbrock, *Legal Migration to the European Union*; Eisele, *The External Dimension of the EU's Migration Policy. Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective*; K. Groenendijk, Die Bedeutung der Assoziation EWG-Türkei für türkische Arbeitnehmer in den Niederlanden: Wie 'soft law' zu harten Gesetz gemacht wird, in: H. Lichtenberg u.a. (eds.), *Gastarbeiter - Einwanderer - Bürger? Die Rechtsstellung der türkischen Arbeitnehmer in der Europäischen Union* (Baden-Baden: Nomos, 1996), p. 101-132;

136 For the most recent case-law on the EEC-Turkey Association Agreement, see Centre for Migration Law, Faculty of Law, Radbboud University, CJEU Overview of judgments and pending cases on: Regular Migration / Asylum of Third-Country Nationals / Borders and Visas / Irregular Migration / EEC-Turkey Association Agreement / Free Movement, available at: http://www.ru.nl/law/cmr/documentation/cmr-newsletters/cjeu-overview/ (accessed 4 February 2018).

2.6. The new generation of temporary and circular migration policies

Many European countries introduced a second generation of temporary migrant worker policies in the 1990s. Guest-worker policies with restrictive discriminatory rules, preventing permanent residence and restricting family reunion, were also established in Gulf Oil States and in the Asian "tiger economies".[137] As has been stressed by Castles, the policy idea of admitting temporary foreign workers was "resurrected".[138] This part of the chapter provides a non-exhaustive list of some of the new generation of temporary and circular migration policies that have been developed in the global context as a tool for migration management, which are often given as examples in the academic and policy literature[139] and some of the interviewed experts for the aims of this study.[140]

Economic and demographic factors, as well as the demand for migrant workers of all skill levels, led to the reintroduction of guest-worker models.[141] The increasing levels of undocumented migration also played key role in the revival of this policy instrument. In addition, fear of brain drain and the growing inequalities in the global context provided sound arguments in favour of resurrecting the temporary migrant worker programmes. Foreign policy considerations, cultural exchange and commuting opportunities between "natural" labour markets divided by the borders of neighbouring countries were also among the reasons for reintroducing this policy model.[142] Another factor that was mostly propounded by the international organisations and the European Commission, was that on the basis of the

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137 S. Castles, 'Guestworkers in Europe: A resurrection?', *International Migration Review,* 40/4 (2006), p. 746. For more details on the Gulf States, see Castles, Haas, and Miller, *The Age of Migration. International Population Movements in the Modern World*, pp. 178-181. On circular migration between the EU and the MENA region, see T. Fakhoury, 'The difficult conceptualisation of circular migration between the EU and the MENA region', *Journal of identity and migration studies,* 4/1 (2010). On Asian labour migration, see Castles, Haas, and Miller, *The Age of Migration. International Population Movements in the Modern World*, pp. 153-162. P. Wickramasekara, 'Circular Migration: A Triple Win or a Dead End', Discussion Paper No 15, The Global Union Research Network, (2011), pp. 46-47.

138 S. Castles, 'Guestworkers in Europe: A resurrection?', *International Migration Review,* 40/4 (2006).

139 See for instance Wickramasekara, 'Circular Migration: A Triple Win or a Dead End'; K. Newland, D. R. Mendoza, and A. Terrazas, 'Learning by Doing: Experiences of Circular Migration', Migration Policy Institute, Insight, September (2008); Castles and Ozkul, 'Circular Migration: Triple Win, or a New Label for Temporary Migration?'; S. McLoughlin and R. Münz, 'Temporary and circular migration: opportunities and challenges', Working Paper No 35, (2011).

140 For instance interview #12 with academic, Italy, May 2013; Interview # 15 with representative of international organisation, Belgium, August 2013; Interview # 16 with representative of international organisation, Switzerland, October 2013; Interview # 17 with representative of international organisation, Switzerland, April 2014. All listed in Annex

141 Castles, 'Guestworkers in Europe: A resurrection?', p. 746.

142 Martin, 'Managing Labor Migration: Temporary Worker Programs for the 21st Century', p. 11.

historical experience, new appropriate policy settings could be introduced that would avoid the mistakes of the 1950s and 1960s.[143]

One of the main differences between the old and new generation of guest-workers schemes was that the new ones, along with low-skilled workers, also aimed to attract highly-skilled workers. As this section demonstrates, their scope and duration varied significantly from country to country but they were, in general, more limited in terms of volume when compared to the old ones.[144] They also vary in respect of the rights that they provide to low- and highly-skilled workers. Another difference is that some of them possessed a new major policy goal, which was to link migration to the development of countries of origin in order to mitigate the negative effects of any potential brain drain. The new generation of temporary migrant worker programmes were regulated mainly through bilateral agreements or memoranda and were based on the old assumption that migrant workers would return to their countries of origin upon the expiration of their contracts.[145] The work contracts were, in general, short-term and permits were often tied to a specific geographic zone, occupation and employer.[146]

2.6.1. Policy examples from Europe

Germany

Germany reintroduced the temporary migrant workers programmes through the adoption of agreements with Central and Eastern European (CEE) countries at the beginning of the 1990s.[147] In addition to the identified labour shortages, the decision to revive these programmes was also influenced by Germany's reunification and the collapse of communist regimes in Central and Eastern European countries, where the German government had planned to encourage a process of democratisation.[148] Nonetheless this decision was not taken only out of altruism but it aimed to establish control over the immigration waves from the CEE countries, which

143 See Chapter 4.
144 In this regard, see Castles, 'Guestworkers in Europe: A resurrection?'.
145 P. Plewa and M. J. Miller, 'Postwar and Post-Cold War Generations of European Temporary Foreign Worker Policies: Implications from Spain', *Migraciones Internacionales,* 3/2 (2005), p. 60.
146 Ibid.
147 For more details see Groenendijk and Hampsink, *Temporary Employment of Migrants in Europe*, pp. 30-31.
148 K. F. Zimmermann et al., *Immigration Policy and the Labor Market. The German Experience and Lessons for Europe* (Springer 2007), p. 11.

started to increase after 1989.[149] The democratically elected governments in the CEE countries saw labour migration to the EU as a potential means to temporarily remedy their internal problems in relation to economic transformation, as well as unemployment, and therefore they sought opportunities to facilitate this type of migration through the conclusion of bilateral and intergovernmental agreements with Germany.[150]

Germany established five different recruitment programmes for Eastern Europeans, which marked a shift away from a macro-admission programme in the past to multiple micro-admission programmes.[151] The main programmes covered: contract workers (*Werkvertragsarbeitnehmer*); seasonal workers (*Saisonarbeitnehmer und Schaustellergehilfen*); border commuters (*Grenzgängerbeschäftigung*); trainees - also called "New Guest workers" (*Gastarbeiter*) - and other categories such as nurses, domestic workers, etc. In 2000, Germany also introduced the so-called Green Card Regulation for IT specialists which established various quotas in relation to those kinds of workers.[152] This section briefly presents two of these temporary programmes with circular elements: the seasonal worker programme and the Green card system.

Germany had the largest number of seasonal workers in Europe: in 2009, 300 000 seasonal work permits were issued.[153] Therefore, its programme was used as a model for the elaboration of the Seasonal Workers' Directive. Within the Seasonal workers programme, migrant workers could take up employment in Germany for up to six months per year and up to nine months for carnival sector workers *(Schaustellergehilfen*).[154] German employers could recruit workers who they had recruited from the previous season by providing their names or simply by making a request for a given number of workers to the German Federal Employment Agency. This employment was temporary in nature and did not count as residence for the purposes of obtaining long-term residence status, unemployment or social welfare benefits.[155] The work permits were tied to a specific employer, but

149 Hönekopp, 'Labour Migration to Germany from Central and Eastern Europe - Old and New Trends', p. 8.

150 Migrationsbericht des Bundesamtes für Migration und Flüchtlinge im Auftrag der Bundesregierung (2003), p. 52

151 See Martin, 'Managing Labor Migration: Temporary Worker Programs for the 21st Century',

152 B. Glorius, "Report from Germany" in Modes of Migration Regulation and Control in Europe, Doomernik, J. and Jandl, M. (eds), (2008), IMISCOE reports, p. 86.

153 R. Bünte and W. Müller, 'A closer look at the seasonal sector: Germany's seasonal workers programme', in S. Mcloughlin and R. Münz (eds.), *Temporary and circular migration: opportunities and challenges* (Working Paper No 35: European Policy Centre 2011), p. 35.

154 Ibid., p. 36.

155 Ibid.

changes were allowed so long as prior notification was given to the responsible German Federal Employment Agency (*Bundesagentur für Arbeit*).

The Green Card Regulation allowed potential foreign workers to register their interest online to work in Germany and to upload their qualifications. They were recruited only after the local Employment Service had given employers the permission to hire a foreign worker.[156] IT specialists qualified for a green card if they held a degree in IT and if they were already resident in Germany for this purpose, or if they had a job offer in Germany with minimum gross income of 51 000 Euro per year, which they had to then substantiate.[157] This programme provided for a maximum period of stay of five years and transitional periods for job-seekers in case of any premature job loss. This, however, meant that IT workers were not entitled to long-term residence and nor did they have the right to family reunification. Up to 20 000 work permits were available for this type of employment, but this policy measure only attracted around 5000 highly-skilled workers.[158] This failed policy attempt was considered part of the process of liberalising labour migration before the adoption of the new Immigration Act in 2004.[159]

Spain

The organised recruitment of guest workers in Spain began in the late 1990s.[160] One of the reasons for the introduction of this policy measure was the widespread practice of employing irregular migrants due to the existing discrepancy between the restrictive immigration policies towards low-skilled workers and the needs of the labour market.[161] What made the Spanish system distinct form the rest of the European programmes were the "decentralized local hiring initiatives" in the agricultural sector which were based on a flexible legislative and institutional framework.[162]

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156 Martin, 'Managing Labor Migration: Temporary Worker Programs for the 21st Century', p. 20.

157 Zimmermann et al., *Immigration Policy and the Labor Market. The German Experience and Lessons for Europe*, p. 13.

158 S. Castles, 'Back to the Future? Can Europe meet its Labour Needs through Temporary Migration?', *International Migration Institute Working Papers, University of Oxford,* Paper 1 (2006b), p. 14.

159 B. Glorius, 'Report from Germany', in J. Doomernik and M. Jandl (eds.), *Modes of migration regulation and control in Europe* (Amsterdam University Press, IMISCOE Reports 2008), p. 86.

160 For an overview of the legislative basis of the overall labour migration policy in this period, see Groenendijk and Hampsink, *Temporary Employment of Migrants in Europe*, pp. 65-69.

161 R. Zapata-Barrero, R. F. García, and E. Sánchez-Montijano, 'Circular Temporary Labour Migration: Reassessing Established Public Policies', *International Journal of Population Research,* Article ID 498158 (2012), p. 3.

162 A. López-Sala et al., 'Seasonal Immigrant Workers and Programs in UK, France, Spain and Italy', Temper Working Paper Series: Temporary versus Permanent Migration, (2016), p. 27. See ibid for other examples of seasonal worker programmes.

The Spanish system is regulated on the basis of the Organic Law on the Rights and Freedoms of Foreigners in Spain and their Social Integration 4/2000 (*Ley Orgánica 4/2000 sobre Derechos y Libertades de los Extranjeros en Espana y su Integración Social*),[163] which authorises temporary residence and employment and the establishment of quotas.[164] The annual quotas (*contigentes)* are agreed according to provincial and sectorial needs and they are assessed on the basis of a multi-level process that involves trade unions, entrepreneurs and regional authorities, which are ultimately approved by the national government.[165]

Seasonal workers are preferentially recruited from countries with which Spain has signed bilateral framework agreements such as, amongst others, Ecuador, Columbia, the Dominican Republic and Morocco.[166] The bilateral agreements provide for the recruitment of workers directly in their countries of origin, serving as the "building blocks for organising labour migration flows in general and the migration of low-skilled temporary workers in particular".[167] In addition, the Spanish model also allows for agreements to be signed between governments of countries of origin and worker's unions or business associations, which in turn creates different recruitment programmes. For instance, the programme managed by the *Unió de Pagesos* in the Catalonian agricultural sector is often referred to as a good practice in this respect,[168] but it has also been criticised for violating workers' rights.[169] It was used as a basis to implement the Temporary and Circular Labour Migration plan between Spain and Columbia with the support of the

163 The law has been amended severeal times and further implemented by Real Decretos. For an overview of the main legal changes, see ibid., pp. 28-29.

164 Zapata-Barrero, García, and Sánchez-Montijano, 'Circular Temporary Labour Migration: Reassessing Established Public Policies', p. 5.

165 S. Carrera and A. s. Faure-Atger, 'Impact of the Seasonal Employment of Third-Country Nationals on Local and Regional Authorities', Report for the Committee of the Regions, (2010), p. 27.

166 For an updated list, see López-Sala et al., 'Seasonal Immigrant Workers and Programs in UK, France, Spain and Italy', p. 29.

167 Zapata-Barrero, García, and Sánchez-Montijano, 'Circular Temporary Labour Migration: Reassessing Established Public Policies', p. 4.

168 For more details, see ibid., p. 5. For other examples, see López-Sala et al., 'Seasonal Immigrant Workers and Programs in UK, France, Spain and Italy', pp. 27-38. Newland, Mendoza, and Terrazas, 'Learning by Doing: Experiences of Circular Migration', pp. 11-12.

169 See for instance O. A. Rodríguez, 'Importing Poverty for the Catalonian Agriculture. The Case of Unió de Pagesos System. Conference Paper', (2014).

IOM (*Migración laboral, temporal y circular de trabajadores entre Colombia y España. Un modelo a consolidar Migración laboral, Temporal y Circular*).[170]

According to the relevant Spanish legislation, temporary migrants, such as seasonal workers or contract workers, are allowed to stay for up to nine months in any given year and they are obliged to return to their countries of origin after the expiration of their work permits.[171] Within one month after their return, they are required to register in the consular offices, where they will be issued with a visa.[172] Migrants that fail to register run the risk of receiving a refusal and therefore this may jeopardise their chances of securing work permits in the future. Workers who have complied with this requirement are given priority in responding to future job offers in the same economic activity.[173] Moreover, those migrant workers who have participated in such programmes and who have certified their return can also be directly employed by a specific employer, without having to repeat the whole recruitment process.[174] In this way the Spanish legislation facilitates circular migration for seasonal workers.[175]

Seasonal migrant workers in Spain do not have the right to change their employer because their work permit is tied to a specific contract, which in turn creates "highly dependent relationships".[176] In most of the cases, they cannot benefit from the right to family reunification because they need to have held a permit for at least one year.[177] Despite being formally registered in the Spanish social security system, they are not obliged to make contributions to the state pension funds,[178] which places them in a vulnerable situation because of their circularity between

170 Castles and Ozkul, 'Circular Migration: Triple Win, or a New Label for Temporary Migration?', p. 34. See also McLoughlin and Münz, 'Temporary and circular migration: opportunities and challenges', p. 31. Another circular migration initiative that has been facilitated by the IOM is the Mauritius' Circular Migration Case. For more information, see Global Forum on Migration and Development, Mauritius' Circular Migration Case, rethrieved at https://www.gfmd.org/pfp/ppd/16 (accessed 12 November 2017). See also Chapter 4.

171 Zapata-Barrero, García, and Sánchez-Montijano, 'Circular Temporary Labour Migration: Reassessing Established Public Policies', p. 5.

172 López-Sala et al., 'Seasonal Immigrant Workers and Programs in UK, France, Spain and Italy', p. 32.

173 Ibid.

174 Ibid.

175 Ibid., p. 32.

176 Castles and Ozkul, 'Circular Migration: Triple Win, or a New Label for Temporary Migration?', p. 34; López-Sala et al., 'Seasonal Immigrant Workers and Programs in UK, France, Spain and Italy', p. 32.

177 Zapata-Barrero, García, and Sánchez-Montijano, 'Circular Temporary Labour Migration: Reassessing Established Public Policies', p. 8.

178 Ibid.; López-Sala et al., 'Seasonal Immigrant Workers and Programs in UK, France, Spain and Italy', p. 32.

two countries. Finally, and contrary to what some authors have suggested,[179] seasonal migrant workers in Spain have little possibilities to switch to permanent residency.[180] They can apply for the initial temporary permit after five years, which means that a seasonal worker in Spain can enjoy long-term residence only after at least ten years.

Sweden

By way of contrast to the other European models that were presented above, the Swedish approach to circular migration is based on the notion that "circular migration needs to be viewed as spontaneous rather than managed within programmes and projects".[181] Sweden introduced new needs-governed labour migration rules at the end of 2008, which were part of a reform that aimed to create "an effective and flexible system for labour migration".[182] The new legislation empowered employers to recruit foreign workers outside Europe in cases they were unable to fill a vacancy with a Swedish or EU worker, thereby limiting the powers of the Swedish Employment Agency to establish whether there is a need for foreign recruitment.[183] The new system applies to the Swedish labour market without making a distinction between highly and low-skilled workers.[184] These rules were also expected to improve conditions for circular migration to and from Sweden, even though this was not part of the Swedish government's strategy for addressing labour shortages.[185] The facilitation of circular migration is a rather "significant element" of the Swedish government's efforts to foster movement across borders and utilise the impact of migration on development by removing administrative

179 Castles and Ozkul, 'Circular Migration: Triple Win, or a New Label for Temporary Migration?', p. 34.

180 Zapata-Barrero, García, and Sánchez-Montijano, 'Circular Temporary Labour Migration: Reassessing Established Public Policies', p. 8.

181 McLoughlin and Münz, 'Temporary and circular migration: opportunities and challenges', p. 28.

182 H. Schneider and A. Wiesbrock, 'Circular migration: A triple win situation? Wishful thinking or a serious option for suitable migration policy?', in D. Schiek, U. Liebert, and H. Schneider (eds.), *European Economic and Social Constitutionalism after the Treaty of Lisbon* (Cambridge: Cambridge University Press, 2011), p. 143. European Migration Network, 'Temporary and Circular Migration: empirical evidence, current policy practice and future options in EU Member States. Report on Sweden', Prepared by Migrationsverkert, (2011), p. 10. For more details on the recruitment procedures, see B. Parusel, 'Country Profile: Sweden', (2015). Accessed on 26 October 2017 at http://www.bpb.de/gesellschaft/migration/laenderprofile/215658/immigration-circular-migration

183 Schneider and Wiesbrock, 'Circular migration: A triple win situation? Wishful thinking or a serious option for suitable migration policy?', p. 143.

184 Ibid.

185 European Migration Network, 'Temporary and Circular Migration: empirical evidence, current policy practice and future options in EU Member States. Report on Sweden', p. 10.

barriers.[186] This policy is based on the notion that "increased mobility is fundamentally good for Sweden, the EU, third countries and migrants themselves".[187]

In line with this policy, the Swedish government appointed a Parliamentary Committee on Circular Migration and Development in order to examine the conditions for migration to and from Sweden and to analyse the connection between circular migration and development.[188] In its interim report, the Committee stressed that, amongst other things, the following policy elements are of crucial importance in relation to circular migration and development: dual citizenship, easier access to permanent residence, absence without loss of residency status, integration and the portability of acquired social benefits, such as earnings-related old-age pensions.[189]

The final findings and policy recommendations of the Committee that were presented in 2011 formed the basis for a government Bill proposal that aimed to facilitate circular migration, which was subsequently approved by the Swedish parliament in 2014.[190] The main legislative changes concern permanent residence permit holders that reside outside of Sweden, who can keep their permits for up to two years so long as they have notified the Swedish Migration Board, and labour migrants with temporary residence permits who are allowed to spend certain periods of time outside of Sweden and still be able to qualify for a permanent residence permit if they have been working in Sweden for at least four years in the past seven years.[191] As Parusel stresses "[w]ith this reform, Sweden made once again clear that it does not trust "managed" policies for circular migration, which, for example, allow labour migrants to stay for a predetermined period of time only. Instead, from the Swedish perspective, the migrants themselves shall be able to decide".[192]

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186 Ibid. Government Communication, 'Implementation of Policy Coherence for Development – Focus: the Global Challenge of Migration Flows', Skr. 2013/14:154, Stockholm, 13 March 2014), p. 18.

187 European Migration Network, 'Temporary and Circular Migration: empirical evidence, current policy practice and future options in EU Member States. Report on Sweden', p. 10.

188 Government Communication, 'Implementation of Policy Coherence for Development – Focus: the Global Challenge of Migration Flows', p. 17.

189 For more details see ICMPD, 'Prague Process Handbook on Managing Labour and Circular Migration', (2014), p. 57. Ministry of Justice of Sweden, Sweden's Committee for Circular Migration and Development, Fact Sheet, September 2010.

190 Government Bill 2013/14:213 approved by the Riksdag on 18 June 2014.

191 B. Parusel, 'Lessons from Sweden', in V. Bertelsmann (ed.), *A Fair Deal on Talent –Fostering Just Migration Governance. Lessons from Around the Globe. Reinhard Mohn Prize 2015* (Verlag Bertelsmann Stiftung, 2015), p. 150.

192 Ibid.

The Netherlands

After the end of the guest-worker recruitment period in 1973, the need for foreign labour in the Netherlands did not decrease.[193] This need was met mainly by migrants from the former Dutch colonies and those admitted on the basis of family reunification. The only form of temporary employment of migrants that was actively supported by the government was the secondment of Yugoslav workers, which continued until 1991.[194] A gradual liberalisation of the admission of seasonal workers had been observed since the beginning of the 1980s, which coincided with the shift in the political regime in Poland and in the rest of Eastern Europe from 1989 onwards.[195] Apart from that, the majority of labour migrants that came to the Netherlands in the 1990s were medium and highly-skilled professionals.[196]

The Netherlands developed a selective labour migration approach that began in 2000.[197] In line with this approach, the Dutch migration policy aims to make a distinction between temporary migration and labour migration that can lead to settlement, which is generally between medium- and low-skilled workers on the one hand and highly-skilled migrants, on the other.[198] In 2004, highly-skilled migrants were covered by the Highly Skilled Migrants Scheme, which introduced a fast-track procedure for this category of foreign workers as a result of amendments to the Aliens Act of 2000.[199] Due to the country's experience with "temporary" guest-workers in the past, the Dutch government has been rather "reluctant" to engage in any form of temporary migration.[200] Thus, temporary and circular

193 Groenendijk and Hampsink, *Temporary Employment of Migrants in Europe*, p. 63.
194 Ibid., p. 63. Fore more details, see also pp. 57-61.
195 Ibid., pp. 63-64. For more details, see also pp. 55-56.
196 Wiesbrock, *Legal Migration to the European Union,* p. 55.
197 Ibid.
198 N. Reslow, 'Temporary Migration in the Netherlands', in P. Pitkänen and S. Carrera (eds.), *Transnational Migration in Transition: State of the Art Report on Temporary Migration. Collected Working Papers from the EURA-NET project* (University of Tampere, 2014), p. 231. Wiesbrock, *Legal Migration to the European Union,* p. 57. This vision was formalised following the adoption of the Modern Migration Policy Act in 2013.
199 M. Siegel and V. Van der Vorst, 'Evaluation of the "Blue Birds" Circular Migration Pilot in the Netherlands', (2012), p. 13.
200 Ibid., p. 15. European Migration Network, 'Temporary and Circular Migration: empirical evidence, current policy practice and future options in the Netherlands', Prepared by Immigration and Naturalisation Service, Staff Directorate for Implementation and Policy, IND Information and Analysis Centre, Dutch National Contact Point for the EMN, (2010), p. 19.

migration was considered "the last option in a package of measures to be taken to reduce shortages in the labour market".[201]

Nevertheless, circular migration entered the Dutch immigration policy as part of the migration – development nexus, which became part of an integrated approach that was adopted by the Ministries of Justice and Foreign Affairs respectively.[202] Several circular migration projects were initiated, which focused mainly on return in line with the dominant position of the Ministry of Justice, which perceived migration to be a problem.[203] They encouraged highly-skilled foreigners from developing countries that were settled in the Netherlands to return to their countries of origin for short periods of time in order to foster development through knowledge transfer.[204] In the context of the IOM Migration and Development (MIDA) programme, for instance, the IOM facilitated over 250 temporary assignments of Ghanaian health workers that were residing in the Netherlands to work in hospitals and health institutions in Ghana in the period between 2008 and 2012.[205] In addition, health workers from Ghana had the opportunity to undertake specialised training at health care institutions in the Netherlands.[206] Another similar initiative that was financed by the Dutch government was the Temporary Return of Qualified Nationals (TRQN), which aimed to contribute to the reconstruction and development of several former war zones, namely Afghanistan, Bosnia-Herzegovina, Kosovo, Montenegro, Serbia, Sierra Leone and Sudan.[207] This was done by temporarily placing, in each target country, highly educated

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201 European Migration Network, 'Temporary and Circular Migration: empirical evidence, current policy practice and future options in the Netherlands', p. 15. Despite this emphasis on highly-skilled migrants, however, shortages of low-skilled workers led to the implementation of a "Seasonal labour" project between 2002 and 2007. For more details on this project see Siegel and Van der Vorst, 'Evaluation of the "Blue Birds" Circular Migration Pilot in the Netherlands', p. 14.

202 Schneider and Wiesbrock, 'Circular migration: A triple win situation? Wishful thinking or a serious option for suitable migration policy?', p. 141. European Migration Network, 'Temporary and Circular Migration: empirical evidence, current policy practice and future options in the Netherlands', pp. 15-18.

203 Schneider and Wiesbrock, 'Circular migration: A triple win situation? Wishful thinking or a serious option for suitable migration policy?', p. 142.

204 Siegel and Van der Vorst, 'Evaluation of the "Blue Birds" Circular Migration Pilot in the Netherlands', p. 14.

205 International Organisation for Migration, MIDA Ghana Health III project, retrieved at: http://www.iom-nederland.nl/en/migration-and-development/95-migration-and-development/archive/90-mida-ghana-health-iii-project (accessed 30.10.2017).

206 International Organisation for Migration, MIDA Ghana Health III project, retrieved at: at: http://www.iom-nederland.nl/en/migration-and-development/95-migration-and-development/archive/90-mida-ghana-health-iii-project (accessed 30.10.2017).

207 International Organisation for Migration, Temporary Return of Qualified Nationals (TRQN) project, retrieved at: http://www.slcu.nl/images/IOM.pdf (accessed 30.10.2017).

persons whom originated from that country but who lived in the Netherlands in order to foster the transfer of knowledge to those areas.[208]

In line with the Dutch policy on migration and development,[209] a pilot circular migration scheme was launched in 2009 and ran until the end of 2012. The so-called "Blue Birds" circular migration pilot programme aimed to recruit 160 migrants from Indonesia and South Africa,[210] who were to be employed in the Netherlands for a maximum period of two years in those sectors which were facing labour shortages.[211] The workers did not have the right to change their employer or to reunite with their family members. Nor did they have a right to renew their permits and they were thus excluded from access to long-term residence. As was pointed out by the implementing organisation, the HIT foundation, this meant that the pilot actually resembled a temporary migration scheme rather than a circular migration scheme.[212]

Yet, 15 months into its implementation, only eight migrants were working in the Netherlands on the basis of this scheme.[213] This consequently led to the premature termination of the pilot. The "Blue Birds" evaluation study that was carried out by Siegel and Van der Vorst provides a detailed analysis of the reasons as to why the project failed which included, amongst other things, the Ministries' conflicting visions about circular migration, the shifted political situation in the Netherlands and the economic crisis.[214] Considering the focus of this study, the most important lessons that can be learned pertain to the recognition of qualifications issues and the lack of any flexibility in the participation criteria. During the implementation of the pilot, diplomas and skills were not recognised by the Dutch system for particular jobs, which meant that migrants had to undertake a recognition procedure – a process that required additional training and exams.[215] Employers considered this to be an obstacle and therefore it served as one of the primary reasons as to why there was scarce participation in the pilot. Another important

208 Ther were also other small scale circular migration initiatives. For more information, see Siegel and Van der Vorst, 'Evaluation of the "Blue Birds" Circular Migration Pilot in the Netherlands', p. 15.
209 European Migration Network, 'Temporary and Circular Migration: empirical evidence, current policy practice and future options in the Netherlands', p. 19.
210 Siegel and Van der Vorst, 'Evaluation of the "Blue Birds" Circular Migration Pilot in the Netherlands', p. 4.
211 Ibid., pp. 26-27.
212 HIT Foundation, 'Pilot Circular Migration.Towards Sensible Labour Migration Policies. Lessons Learned & Recommendations', (2011), p. 12.
213 Reslow, 'Temporary Migration in the Netherlands', p. 243.
214 Siegel and Van der Vorst, 'Evaluation of the "Blue Birds" Circular Migration Pilot in the Netherlands', pp. 28-36.
215 Ibid., p. 32.

lesson concerns the lack of flexibility in relation to the participation criteria, *inter alia* concerning contract duration, sectors, country choice and language barriers. These problematic issues stemmed from the attempt to enforce a managed circular migration model. Such model did not allow for "spontaneous" circular migration linked to the labour market needs and rather resembled a temporary migration scheme, which was maintained at the expense of heavy administrative system.[216]

2.6.2. Policy examples outside Europe

The USA

As Castles and Ozkul have pointed out, "the desire for flexible temporary or circular migration schemes" was not limited to Europe.[217] In the 1990s, the USA introduced more than 20 different micro guest-worker programmes, each of which was named after the visa that was issued to the foreigner. Each of them have different admissions criteria, length of stay and opportunities for status adjustment. Martin summarises their differences along two lines: the requirements that employers must satisfy to ensure that guest-workers are admitted and the rights of migrants.[218] The number of temporary employment visas has more than doubled in recent decades from just over 400,000 in 1994 to over one million in 2014, and this figure is dominated by the visas that have been issued for managerial, skilled and professional workers.[219]

The largest US guest-worker programme is the H-1B.[220] It permits US employers to recruit foreign professionals in the field of architecture, engineering, mathematics, education, medicine and other fields that require a Bachelor's degree as minimum level qualification or higher depending on the specialty one is working in.[221] In recent years, this opportunity has been used mainly by specialist in the IT

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216 See ibid., p. 15.

217 Castles and Ozkul, 'Circular Migration: Triple Win, or a New Label for Temporary Migration?', p. 36.

218 Martin, 'Managing Labor Migration: Temporary Worker Programs for the 21st Century', p. 16.

219 R. E. Wasem, 'Temporary Professional, Managerial, and Skilled Foreign Workers: Policy and Trends. CRS Report. Prepared for Members and Committees of Congress', (2016), p. 1.

220 It is currently regulated in the Immigration and Nationality Act (INA), Section 101(a)(15)(H). For more details on the number of visas that are issued, see ibid., pp. 1-2.

221 U.S. Citizenship and Immigration Services, H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models, rethrieved at https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models (accessed 9 November 2017).

and computer industries.[222] The H-1B visa has an annual cap of 65,000 visas for each fiscal year, however there are some exceptions to this.[223]

H-1B visa holders can remain in the US for up to six years (initial three year visas can be renewed once)[224] and can settle permanently through a "quasi regularization" procedure. They need to find a US employer to sponsor them through a certification process for an employment immigration visa.[225] Since employers hold the work permits, workers are only authorised to work for the sponsoring employer and they need to follow the above mechanism if they want to change their employer.[226] H-1B workers can be accompanied by their spouse and children by obtaining H-4 visas.[227] The US visa regime for highly-skilled workers is criticised mainly because of the amount of uncontrolled power that it places in the hands of employers and the uneven worker-employer relationship that they create, leading to the inability to change employer in case of mistreatment, threat of deportation and unclear prospects for status adjustment.[228] It has been stated that "guestworkers are rendered de facto indentured servants, unable to change their employment situation without penalty and indebted to their recruiting agency".[229]

The two major programmes for admitting low-skilled foreign workers to the USA are the H-2A visa for agricultural work and the H-2B visa for seasonal non-agricultural work, such as landscaping, amusement parks, housekeeping, forestry,

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222 See for instance the data in Nicole Torres, The H-1B Visa Debate, Explained, Harvard Business Review, retrieved at https://hbr.org/2017/05/the-h-1b-visa-debate-explained (accessed 25 August 2017).

223 U.S. Citizenship and Immigration Services, H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models retrieved at https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models (accessed 9 November 2017).

224 With some exceptions under Sections 104(c) and 106(a) of the American Competitiveness in the Twenty-First Century Act (AC21).

225 R. Hira, 'Bridge to Permanent Immigration or Temporary Labor? The H-1B Visa Program Is A Source of Both', *U.S. Engineering in a Global Economy, NBER Chapters* (National Bureau of Economic Research, 2017), p. 2.

226 Ibid.

227 For more details, see U.S. Citizenship and Immigration Services, H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models, retrieved at https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models (accessed 9 November 2017).

228 See Hira, 'Bridge to Permanent Immigration or Temporary Labor? The H-1B Visa Program Is A Source of Both'; Wickramasekara, 'Circular Migration: A Triple Win or a Dead End'; A. Read, 'Learning from the Past: Designing Effective Worker Protections for Comprehensive Immigration Reform', *Temple Political & Civil Rights Law Review,* 16/2 (2007).

229 Wickramasekara, 'Circular Migration: A Triple Win or a Dead End', p. 42.

construction and restaurants.[230] They were created in 1986 following the entry into force of the Immigration Reform and Control Act, which split the existing H guest-worker programme into two separate programmes.[231] Both require the prospective employer to provide a pre-admission certification (labour market test), proving that there are no local workers available to fill the vacancies in question at a wage set by the government.[232]

The H-2B programme allows workers to return for the following year, as long as they have been outside of the U.S. for three months immediately preceding the new visa application,[233] and thus it contains elements of circular migration.[234] H-2B visas authorise work for up to ten months.[235] An H-2B visa may be extended for up to one year but the total amount of time an H-2B worker may be continuously present in the US is three years, after which workers need to leave the country.[236] Such workers are exempted from the H-2B cap, which is set at 66,000 visas per fiscal year.[237] As in the case of H-1B visas, the H-2B workers are bound to their employers and thus their "ability to remain in the country depends on remaining in the good graces of the employer".[238] Furthermore, H-2B visa holders do not have a path to obtain lawful permanent residence in the US, unless they find an employer that is willing to sponsor them for such an employment-based status while they are still in the country.[239] H-2B workers' spouses and unmarried children under the age of 21 years of age may seek admission under the H-4 visa category.[240]

The H-2B programme is considered to be "significantly deviating from its original objectives".[241] Its opponents stress that the programme facilitates the replacement

230 Global Workers Justice Alliance, 'Recruitment Rules: Countries of Employment. The Recruitment of Migrants in the Mexico and Central America Region for Temporary Work in The United States and Canada', (2016), p. 5.
231 Wickramasekara, 'Circular Migration: A Triple Win or a Dead End', p. 43.
232 For more details, see Global Workers Justice Alliance, 'Recruitment Rules: Countries of Employment. The Recruitment of Migrants in the Mexico and Central America Region for Temporary Work in The United States and Canada', p. 16; p.18.
233 Title 8 of Code of Federal Regulations (8 C.F.R.) § 214.2(h)(13)(iv).
234 Wickramasekara, 'Circular Migration: A Triple Win or a Dead End', p. 42.
235 8 C.F.R. § 214.2(h)(9)(iii)(B)(1).
236 8 C.F.R. § 214.2(h)(14), (15).
237 U.S. Citizenship and Immigration Services, Cap Count for H-2B Nonimmigrants, retrieved at https://www.uscis.gov/working-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-h-2b-nonimmigrants (accessed 9 November 2017).
238 Read, 'Learning from the Past: Designing Effective Worker Protections for Comprehensive Immigration Reform', p. 431.
239 See 8 C.F.R. § 214.2(h)(16)(ii).
240 8 C.F.R. § 214.2(h)(9)(iv).
241 Wickramasekara, 'Circular Migration: A Triple Win or a Dead End', p. 42.

of domestic labour forces with foreign workers by H-2B employers in businesses that do not require a seasonal or temporary workforce at all.[242] Many violations have been reported throughout the implementation of the programme that relate to the exploitation of guest workers such as the confiscation of their passports and visa documents and the lack of any possibility to enforce their fundamental workplace rights due to threats of deportation, immigration status or loss of earnings.[243] As result of the poor enforcement and deficient governmental oversight, the H-2B employers have exploited the system of pre-admission certification without seriously advertising the job vacancies among the native population and hiring foreign workers for jobs with low prevailing wages but assigning them to higher level jobs with higher wage standards.[244]

Canada

More than 40 years after the Non-Immigrant Employment Authorization Program was introduced, such programmes have become an established part of Canada's immigration and labour policy.[245] Over the years it evolved from sector and occupation specific programmes to a general Temporary Foreign Worker Program (TFWP), which recruited foreign workers for a wide spectrum of "occupational" labour shortages in Canada.[246] In the 1990s, two general streams were established as a response to demands by employers, targeting highly-skilled and a much broader range of workers in low-skilled occupations.[247] The different streams provided different and unequal entitlements to low-skilled and highly-skilled workers, which were reinforced by the 2002 Immigration and Refugee Protection Act (IRPA) and the regulations deriving thereof.[248] Since 2015, this complex "mosaic" of programmes that is based on specific occupations and sectors is undergoing an overhaul, aiming amongst other things to ensure better working conditions for migrants in Canada.[249]

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242 See ibid., p. 43.
243 See ibid., pp. 43-45.
244 Ibid., p. 43.
245 Fudge and MacPhail, 'The temporary foreign worker program in Canada: low-skilled workers as an extreme form of flexible labour', p. 3.
246 Ibid., p. 5.
247 F. Faraday, 'Made in Canada: How the Law Constructs Migrant Workers' Insecurity', (2012), p. 26.
248 Fudge and MacPhail, 'The temporary foreign worker program in Canada: low-skilled workers as an extreme form of flexible labour', p. 6.
249 See for instance Employment and Social Development Canada, Overhauling the Temporary Foreign Worker Program, retrieved at https://www.canada.ca/en/employment-social-development/services/foreign-workers/reports/overhaul.html (accessed 9 November 2017).

Canada has two programmes that target labour migration in low-skilled occupations that run in parallel with each other: the TFWP and the Seasonal Agricultural Worker Program (SAWP),[250] which was established in 1960s. Even though the good practices from the SAWP have been incorporated into the TFWP,[251] the programmes also share some important differences.[252] Skeldon points out that SAWP is one of the few cases of "'durable' and 'successful' circular migration programmes where the migrants do go home on a regular basis".[253] Furthermore, SAWP has served as a model for the agricultural programmes that are present in Australia and New Zealand.[254] Therefore, the main features of SAWP are presented in this section.

Unlike the TFWP, which is open for all countries, SAWP was established on the basis of Memorandums of Understanding (MOU) between Canada and each participating state, and therefore only migrant workers who are citizens of Mexico or one of the participating Caribbean countries are eligible for recruitment under this programme.[255] In line with these agreements, the Mexican and Caribbean governments are responsible for recruitment, selection and the documentation of workers, who are available to depart when requests are made by Canadian employers.[256] The Canadian government, on the other hand, sets the immigration criteria for admission under the programme which includes, amongst other things, previous experience in farming, a minimum age of 18 years and a signed employment contract.[257]

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250 Global Workers Justice Alliance, 'Recruitment Rules: Countries of Employment. The Recruitment of Migrants in the Mexico and Central America Region for Temporary Work in The United States and Canada', p. 30.

251 Interview # 17 with representative of international organisation, Switzerland, April 2014.

252 For a detiled overview, see Global Workers Justice Alliance, 'Recruitment Rules: Countries of Employment. The Recruitment of Migrants in the Mexico and Central America Region for Temporary Work in The United States and Canada', pp. 33 - 41.

253 R. Skeldon, 'Going Round in Circles: Circular Migration, Poverty Alleviation and Marginality', *International Migration,* 50/3 (2012), p. 53.

254 Interview # 17 with representative of international organisation, Switzerland, April 2014. For more details on these two countries, see Castles, Haas, and Miller, *The Age of Migration. International Population Movements in the Modern World*, pp. 166-168; G. Hugo, 'Circular Migration: Keeping Development Rolling?', (2003); G. Hugo, 'What We Know About Circular Migration and Enhanced Mobility', Policy Brief No7, Migration Policy Institute, (2013).

255 Faraday, 'Made in Canada: How the Law Constructs Migrant Workers' Insecurity', p. 37. For full list of the participating countries, see Employment and Social Development Canada, Hire a temporary worker through the Seasonal Agricultural Worker Program – Overview, retrieved at https://www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural/seasonal-agricultural.html?_ga=2.145065972.1720318686.1510170950-13201522.1509534609 (accessed 9 November 2017).

256 Ibid., p. 38.

257 Ibid.

Both SAWP and TFWP employers can hire temporary foreign workers when Canadians and permanent residents are not available to fill the job, which is proved on the basis of a Labour Market Impact Assessment.[258] SAWP facilitates the recruitment of migrant workers for on-farm employment in primary agriculture.[259] Foreign workers can be hired for a maximum period of eight months, between January 1 and December 15, provided that they are able to offer the workers a minimum of 240 hours of work within a period of six weeks or less.[260] Conversely, workers under the TFWP are no longer subject to "a four-year cumulative duration rule", which previously obliged them to leave Canada after four years of work.[261]

What creates the possibility for circular migration is that there is no cap on the number of years that a foreign worker may participate in the SAWP [262] and at the same time employers have the opportunity to request, by name, the employees that they wish to rehire in a subsequent season.[263] These possibilities, combined with the deliberate recruitment of low-skilled rural workers who have links to their home countries, as well as the reduced entry costs through a cost-sharing

258 For more details, see Employment and Social Development Canada, Hire a temporary worker through the Seasonal Agricultural Worker Program – Overview, retrieved at https://www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural/seasonal-agricultural/apply.html (accessed 9 November 2017).

259 Faraday, 'Made in Canada: How the Law Constructs Migrant Workers' Insecurity', p. 37. For definition of primary agriculture, see Employment and Social Development Canada, Hire a temporary worker through the Seasonal Agricultural Worker Program – Overview, rethrieved at: https://www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural.html. For a list of the national commodities, see Employment and Social Development Canada, Hire a temporary worker through the Seasonal Agricultural Worker Program – Overview, retrieved at: https://www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural/seasonal-agricultural.html?_ga=2.145065972.1720318686.1510170950-13201522.1509534609 (accessed 9 November 2017).

260 Employment and Social Development Canada, Hire a temporary worker through the Seasonal Agricultural Worker Program – Overview, retrieved at https://www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural/seasonal-agricultural.html?_ga=2.145065972.1720318686.1510170950-13201522.1509534609 (accessed 9 November 2017).

261 Pursuant to Section 25.2 of the Immigration and Refugee Protection Act. For background information, see Bryan May, Temporary Foreign Worker Program. Report of the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, House of Commons, Canada, September 2016, retrieved at: http://www.ourcommons.ca/DocumentViewer/en/42-1/HUMA/report-4 (accessed 9 November 2017).

262 Global Workers Justice Alliance, 'Recruitment Rules: Countries of Employment. The Recruitment of Migrants in the Mexico and Central America Region for Temporary Work in The United States and Canada', p. 38.

263 Faraday, 'Made in Canada: How the Law Constructs Migrant Workers' Insecurity', p. 40.

mechanism with employers, lead to low rather large incidences of overstaying.[264] However, "there is no entitlement to return".[265]

SAWP workers can change employer only after they have received prior written approval from the Canadian government, the home country government and the former and future employer.[266] The presence of consulate officers, which is one of the requirements stipulated in the MOUs, can provide support in case there is a need to change employer and other workplace conflicts.[267] SAWP workers pay pension fund contributions and can transfer their accumulated pensions to their countries of origin after they have reached the age of retirement.[268] However, despite the systemic need for farm labour and the long-term circularity of the SAWP workers, they do not have a path to permanent residence[269] and they cannot bring their families to Canada.[270] Unlike SAWP workers who are "permanently temporary",[271] as a result of the 2016 amendments TFWP employees are expected to have better access to permanent residency opportunities.[272] Therefore, despite being described as a 'model' of temporary migration programme that facilitates circular migration, according to the critics of the SAWP the circularity comes at a certain price: excessive employer power over migrant workers who want to come back for a subsequent season, as well as a restriction of the social and political rights of these workers.[273]

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264 World Bank, 'Pacific Islands at home and away: expanding job opportunities for Pacific islanders through labor mobility', (2006), p. 117. Interview # 17 with representative of international organisation, Switzerland, April 2014. See also Newland, Mendoza, and Terrazas, 'Learning by Doing: Experiences of Circular Migration', p. 6.

265 Interview # 17 with representative of international organisation, Switzerland, April 2014.

266 Faraday, 'Made in Canada: How the Law Constructs Migrant Workers' Insecurity', p. 40.

267 Interview # 17 with representative of international organisation, Switzerland, April 2014.

268 World Bank, 'Pacific Islands at home and away: expanding job opportunities for Pacific islanders through labor mobility', p. 120. Interview # 17 with representative of international organisation, Switzerland, April 2014.

269 Faraday, 'Made in Canada: How the Law Constructs Migrant Workers' Insecurity', p. 41.

270 Interview # 17 with representative of international organisation, Switzerland, April 2014.

271 Term coined by N. Sharma, 'On Being not Canadian: the Social Organisation of 'Migrant Workers' in Canada', *Canadian Review of Sociology and Anthropology,* 38/4 (2001), p. 424.

272 See the Governmental response to the Standing Committee recommendations in Bryan May, Temporary Foreign Worker Program. Report of the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, House of Commons, Canada, September 2016, retrieved at: http://www.ourcommons.ca/DocumentViewer/en/42-1/HUMA/report-4/response-8512-421-86 (accessed 9 November 2017).

273 Castles and Ozkul, 'Circular Migration: Triple Win, or a New Label for Temporary Migration?', p. 36. Faraday, 'Made in Canada: How the Law Constructs Migrant Workers' Insecurity', p. 40. For more details, see also J. L. Hennebry and K. Preibisch, 'A Model for Managed Migration? Re-Examining Best Practices in Canada's Seasonal Agricultural Worker Program', *International Migration,* 50 (2012). G. Otero and K. Preibisch, 'Citizenship and Precarious Labour in Canadian Agriculture', (2015); T. Basok and E. Carasco, 'Advancing the Rights of Non-Citizens in Canada: A Human Rights Approach to Migrant Rights', *Human Rights Quarterly,* 32/2 (2010).

2.7. Conclusion to Chapter 2

It is very often the case that academics perceive circular migration policies as a "new label for temporary migration"[274] which have "striking similarities to the European guest-worker programmes".[275] The guest-worker schemes are considered to have largely failed their policy purposes, which raises the question of what the policy lessons are for the new generation of instruments that aim to facilitate circular migration. As this chapter has demonstrated, there is currently a plethora of different policy instruments that are based on bilateral agreements, temporary migration schemes, projects initiatives supported by the EU and other international organisations, as well as the Swedish model that is based on spontaneous circular migration. Therefore, looking into the policy reasons that led to the failure of the guest-worker models serves as a starting point for the development of the analytical framework of this study.

Many of the guest workers returned to their countries of origin. Yet, a significant number stayed because many permits were repeatedly extended and the planned lawful temporary residence of one or two years *de facto* became permanent. This is considered to be one of the main policy failures of the guest-worker schemes. Moreover, in general, they were tied to a specific employer, occupation and region, which led not only to exploitation by their employers but also to breach of contracts by migrant workers and overstay. Therefore, one of the general labour migration policy elements that needs to be considered in the analytical framework of this study is the entry conditions for circular migrants, including access to the host country, e.g., visa regimes, as well as the duration and conditions that are attached to migrants' work permits.

Initially most of the guest-worker schemes did not allow migrants to bring their family members, and some of the schemes were based on the recruitment of single men only. Later, family migration conditions were introduced, subject to *inter alia* residence requirements, housing and long-term employment prospects. However, these restrictions did not prevent family formation in the host country; as well as family migration, even after the foreign labour recruitment was halted at the beginning of the 1970's due to the economic recession. Thus, the analytical

274 Wickramasekara, 'Circular Migration: A Triple Win or a Dead End', pp. 41-45; Hira, 'Bridge to Permanent Immigration or Temporary Labor? The H-1B Visa Program Is A Source of Both'.

275 Hira, 'Bridge to Permanent Immigration or Temporary Labor? The H-1B Visa Program Is A Source of Both'. Schneider and Wiesbrock, 'Circular migration: A triple win situation? Wishful thinking or a serious option for suitable migration policy?', p. 126.

framework of this study would be incomplete if it were to exclude entry conditions for family members.

Family migration was made dependent on long-term employment prospects, which must logically entail continuous residence in the host country. Guest-workers schemes, however, aimed at limiting the migrant's ability to obtain a permanent residence status. Therefore, it was made conditional upon requirements that were difficult for the guest workers to fulfil, such as: uninterrupted periods of residence of at least five to eight years, knowledge of the language of the host country, special permits and suitable housing. Circular migration can constitute a combination of long-term periods of stays, as well as absences from the host country for certain periods of time, which raises the question of whether access to permanent residence is possible for this category of migrants. Therefore, another important element that needs to be considered in this study is the conditions for access to permanent residence.

While working in the host country, guest workers naturally gained new skills and qualifications. Nevertheless, for many migrants, return to their home country was met with de-qualification because their newly gained knowledge could not be transferred. It was inapplicable *inter alia* due to the lack of policies for the recognition of qualifications. Similar to guest workers, by moving repeatedly between their home and the host countries, circular migrants are exposed to the same risk of de-qualification. Thus, another essential policy element that must be taken into consideration in this study is the policies for the recognition of qualifications, both in the home and the host country, which can either facilitate or hinder the transfer of knowledge, which is claimed as one of the advantages of circular migration by its advocates.

Guest workers had limited access to social security during their stay in the host country, as well as upon their return to their country of origin. The payment of accumulated pensions to migrants was only introduced after the 1973 *Oil crisis* as an incentive to provoke guest workers to return. Moreover, this was the only social security benefit that was transferable, which entailed a financial loss for many guest workers, whom contributed to the social security system of the host country and after they returned home. Likewise, because they live between two countries, circular migrants contribute to two social security systems, accumulate different rights and are exposed to the same social security risks as nationals. In order to be able to circulate smoothly, they need to have access to these benefits on the basis of portability instruments. Therefore, the analytical framework of this study must also examine this policy area.

CHAPTER 3:

Circular migration management in light of standards developed at the international and the European level: a framework for analysis[1]

3.1. Introduction

Chapters 1 and 2 presented the key policy areas and problematic issues that need to be considered if this type of circular migration is to be facilitated, namely entry and re-entry conditions, work authorisation, residence status, social security coordination, entry conditions for family members and recognition of qualifications. This chapter focuses on the next logical step: developing a framework to assess whether these policy areas provide a "win" for the migrant worker within the context of the "triple win solution" that circular migration ostensibly offers. The premises thereof are firstly, whether the migrant has a certain degree of voluntarism and "free" movement or generally a free choice in the migration decision. This condition differentiates circular migration policies from general time-bound migration policies that are redolent of the guest-worker models. In other words, if policy makers want to implement effective circular migration policies, they need to design them in such a way so as to accommodate the migrants' transnational links with both the country of origin and destination, as well as to allow the possibility for migrants to determine their own trajectory.[2] Secondly, what needs to be assessed is whether these policies provide adequate protection of the migrant workers' fundamental rights and rights that allow them to benefit from the circulation, such as export of social security benefits when they return back home and provisions to ensure that their qualifications can be recognised.

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1 Parts of this chapter were published in Z. Vankova, 'EU Circular Migration Policies: Dead or Alive? Developing a Rights-based Benchmark Framework for Policy Assessment', *Journal of Immigration, Asylum and Nationality Law*, 30/4 (2016).

2 K. Newland, D. R. Mendoza, and A. Terrazas, 'Learning by Doing: Experiences of Circular Migration', Migration Policy Institute, Insight, September (2008), p.1. See also K. Newland and D. Agunias, 'How can Circular Migration and Sustainable Return Serve as Development Tools?', Background paper for Roundtable 1.4, GFMD, Brussels (2007), p. 11.

In line with these premises, this chapter proposes a two-level benchmark[3] framework for the assessment of circular migration policies. On the first level, standards developed at the international and at the European level in the field of human rights, migration, labour and social security law are identified as possible benchmarks in the study's key policy areas. Only those provisions that cover the two premises of voluntarism and the protection of migrants' rights are included within the benchmark framework; meaning that they are employed as aspirational standards against which circular migration policies can be assessed. On the second level, the proposed benchmark framework includes policy instruments that can help in the implementation of these benchmarks. They are identified as being conducive to circular migration management on the basis of a literature review of the lessons that have been learned from the application of similar time-bound labour migration policies, such as the experience with the guest-worker schemes, as well as good practices that have been identified among the emerging new generation of circular migration programmes that were presented in Chapter 2.

3.2. Standards developed at the international level pertaining to circular migration

This section seeks to present the most important international migration law standards in relation to regular migrant workers - who may be engaged in circular migration - in the thematic policy areas that were identified as pertinent to this type of migration. Its aim is not, however, to provide a full overview of all the international human rights law instruments and labour standards, as well the relevant case law. Conversely, the goal of this mapping exercise is to identify the international law provisions and labour standards that can form part of the analytical framework of this study and which can then be employed as aspirational targets and serve as benchmarks in the subsequent chapters for the purposes of assessing the implementation of circular migration policies at both the European and national level respectively.

There are two issues that need to be clarified when relying on international law provisions as benchmarks for the facilitation of rights-based circular migration. Firstly, the reach of the instruments needs to be considered. Even though human

3 The English Oxford Dictionary defines "benchmark" as "a standard or point of reference against which things may be compared".

rights and international labour standards are generally applicable to all migrants,[4] it follows that in practice their enforceability at the national level depends on which international legal instruments have been ratified by the state.[5] The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) is an example of an international human rights instrument that is under-ratified - with only 48 ratifications -, and which has been primarily ratified by migrant-sending countries.[6] An important exception, however, is the provisions that are contained in instruments which are recognised as customary international law, such as the Universal Declaration of Human Rights [7] (UDHR) and the ILO Declaration on Fundamental Principles and Rights at Work, which are binding for all nations and do not require any ratification.[8] In addition, there are recommendations and declarations that are not legally binding, but can nevertheless serve as an important source for standards.

Secondly, even though there is no international instrument that specifically addresses circular migration (except the ICRMW, which touches upon the circularity of seasonal workers), applicable international standards to this type of migration nevertheless exist. International migration law encompasses a set of international rules and principles governing the entirety of the migration cycle – departure from the country of origin, entry and stay in a country of destination, as well as the return to one's own country.[9] Thus, its inclusive scope covers all migrants, regardless of their grounds of admission (e.g., labour, family reunification), irrespective of their legal status and duration of their stay, which can

4 R. Cholewinski, 'The Human and Labour Rights of Migrants: Visions of Equality', *Georgetown Immigration Law Journal,* 22 (2008), pp. 184 - 185.

5 International Labour Office, Office of the United Nations High Commissioner for Human Rights, and Inter-Parliamentary Union, 'Migration, human rights and governance', Handbook for Parliamentarians N° 24, (2015), p. 39.

6 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, 18 December 1990, entered into force on 1 July 2003. Ratification information retrieved at: http://indicators.ohchr.org (accessed 25 February 2016). No EU Member States have signed this convention. On the reasons behind the low ratification rate, see for instance N. Piper, 'Keeping on the Move: Study of the Genesis of the 1990 Convention on the Rights of All Migrant Workers and their Families and its Implications today', Gerechtigkeit und Frieden, No. 130 (Bonn: German Commission for Justice and Peace 2016).

7 Universal Declaration of Human Rights, G.A. res. 217A (III), 10 December 1948.

8 D. Weissbrodt, *Human Rights of Non-citizens* (Oxford Scholarship Online: January 2009), pp. 12-13.; V. Chetail, 'The Transnational Movement of Persons under General International Law: Mapping the Customary Law Foundations of International Migration Law', in V. Chetail and C. Bauloz (eds.), *Research Handbook on International Law and Migration* (Research Handbooks in International Law series Cheltenham, UK: Edward Elgar Publishing 2014), p. 69.

9 Chetail, 'The Transnational Movement of Persons under General International Law: Mapping the Customary Law Foundations of International Migration Law', p. 2.

among others be transit, temporary or permanent settlement.[10] As was identified in Chapter 1, circular migration is typically characterised by temporary, labour and return migration, as well as the movement of permanently settled migrants to their countries of origin. Therefore, this section aims to identify the international standards that are applicable to the identified components of circular migration.

International human rights instruments protect all persons by "virtue of their essential humanity" and regardless of which nationality they possess.[11] Therefore, migrants should enjoy all human rights by virtue of the fact that they are a human being, unless the "exceptional distinctions" between citizens and migrants are justified by a legitimate state objective and are proportional to achieving that aim.[12] There are nine core international treaties pertaining to human rights, which except for a few provisions,[13] are also applicable to migrants.[14] The international bill of rights, comprising of the UDHR, the International Covenant on Civil and Political Rights[15] (ICCPR) and the International Covenant on Economic, Social and Cultural Rights[16] (ICESCR) contain provisions that are generally applicable to all persons, as well as tailored norms that are of crucial importance to migrants, which are presented in this chapter. Among the specific human rights treaties, the ICRMW is the only migrant-specific instrument that deals with the rights of migrant workers. Other relevant treaties include the International Convention on the Elimination of All Forms of Racial Discrimination,[17] the Convention against

10 Ibid.

11 Special Rapporteur, Final Report on the Rights of the Non-Citizens, delivered to the U.N. Economic and Social Council, Commission on Human Rights, Sub-Committee on the Promotion and protection of Human Rights, U.N. Doc. E/CN.4/Sub. 2/2003/23, p. 2; see also D. Weissbrodt, *Human Rights of Non-citizens* (Oxford Scholarship Online: January 2009).; Cholewinski, 'The Human and Labour Rights of Migrants: Visions of Equality', pp. 177-219.

12 Special Rapporteur, Final Report on the Rights of the Non-Citizens, delivered to the U.N. Economic and Social Council, Commission on Human Rights, Sub-Committee on the Promotion and protection of Human Rights, U.N. Doc. E/CN.4/Sub. 2/2003/23, p. 2.

13 For instance political rights.

14 Cholewinski, 'The Human and Labour Rights of Migrants: Visions of Equality', p. 183.

15 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 16 December 1966, entered into force on 23 Marc 1976. As of February 2016, 169 had ratified the Covenant, including all EU Member States. Bulgaria ratified it on 21 September1970. Poland ratified this convention on 18 March 1977.

16 International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 16 December 1966, entered into force on 3 of January 1976. As of February 2016, 165 states have ratified the covenant, including all EU Member States. Bulgaria ratified the convention on 21 September1970. Poland ratified the convention on 18 March 1977.

17 Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), 21 December 1965, entered into force on 4 January 1969. As of February 2016, 178 states have ratified the convention, including all EU Member States. Bulgaria ratified the convention on 8 August 1966. Poland ratified the convention on 5 December 1968.

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[18] the Convention on the Rights of the Child [19] (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women.[20] These instruments cover the fundamental rights that are relevant to migrant workers, such as the prohibition against discrimination, forced labour, degrading or inhuman treatment or punishment; they are not examined (except for some CRC provisions) here, however, because they fall outside the scope of this study.

The fundamental human rights pertaining to work conditions are complemented by the instruments that have been promulgated by the International Labour Organisation (ILO). ILO's instruments have laid down international labour standards for the protection of migrant workers, which should be included in every comprehensive labour migration policy, especially those that make use of temporary migration.[21] They aim to protect migrant workers from discrimination, exploitation and abuse, which are typically found in marginal, low status and inadequately regulated employment sectors.[22] This study focuses, however, on the specific rights of migrant workers that pertain to circularity, rather than their labour market integration.

The ILO was established with the Treaty of Versailles after WWI and the Preamble of its constitution recognised the importance of "(…) protection of the interests of workers when employed in countries other than their own (…)".[23] There are two ILO conventions that are specific to migrant workers and which can be applied to circular migration issues - ILO Migration and Employment

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18 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 39/46, annex, 10 December 1984, entry into force 26 June 1987. As of February 2016, 159 states have ratified the convention, including all EU Member States. Bulgaria ratified the convention on 16 December 1986. Poland ratified the convention on 26 July 1989.

19 Convention on the Rights of the Child, G.A. res. 44/25, 20 November 1989, entered into force on 2 September 1990. As of February 2016, 197 states have ratified the convention, including all EU Member States. Bulgaria ratified the convention on 3 June 1991. Poland ratified the convention on 7 June 1991.

20 Convention on the Elimination of All Forms of Discrimination Against Women, G.A. res. 34/180, 18 December 1979, entered into force on 3 September 1981. As of February 2016, 190 states have ratified the convention, including all EU Member States. Bulgaria ratified the convention on 8 February 1982. Poland ratified the convention on 30 July 1980.

21 Advocated by N. Baruah and R. Cholewinski, 'Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination', produced by the Organization for Security and Co-operation in Europe, International Organization for Migration and the International Labour Office, (2006), p. 29.

22 Ibid., p. 2.

23 Constitution of the International Labour Organization, adopted by the Peace Conference in April of 1919, 15 UNTS 40, Preamble, second recital. Currently all EU Member States are ILO members as well.

Convention (No. 97),[24] accompanied with non-binding Migration and Employment Recommendation (No. 86),[25] as well as ILO Migrant Workers Convention (No. 143)[26] and the Migrant Workers Recommendation (No. 151).[27] Both ILO Conventions do not, generally, differentiate between long-term and temporary migrants and they provide for the same protection and rights' safeguards, subject to some adjustments (e.g., in relation to social and employment rights).[28] These instruments are complemented by the Guidelines on special protective measures for migrant workers in time-bound activities[29] and the non-binding ILO Multilateral Framework on Labour Migration,[30] providing for special measures in relation to migrants whom are engaged in time-bound activities.

Furthermore, there are also instruments in the field of social security that need to be considered in relation to circular migration: the Equality of Treatment (Accident Compensation) Convention (No. 19),[31] the Convention on Social Equality of Treatment (Social Security) Convention (No. 118),[32] the Maintenance of Social

24 Migration and Employment Convention (Revised), C097, adopted at 32nd ILC session on 01 July 1949, Geneva, entry into force on 22 January 1952. It has 49 ratifications, among which are ten EU Member States. Bulgaria and Poland have not signed the convention.

25 Migration and Employment Recommendation (Revised), R086, adopted at 32nd ILC session on 01 July 1949, Geneva.

26 Migrant Workers (Supplementary Provisions) Convention, C143, adopted at 60th ILC session on 24 June 1975, Geneva, entry into force on 09 December 1978. It has 23 ratifications, among which are five EU Member States. Bulgaria and Poland have not signed the convention.

27 Migrant Workers Recommendation, 1975 (No. 151), adopted at 60th ILC session on 24 June 1975, Geneva.

28 Baruah and Cholewinski, 'Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination', p. 128.

29 Guidelines on special protective measures for migrant workers in time-bound activities, adopted by Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration (21–25 April 1997), MEIM/1997/D.4, Annex I.

30 ILO Multilateral Framework on Labour Migration. Non-binding principles and guidelines for a rights-based approach to labour migration, adopted by tripartite meeting of experts, which convened in Geneva from 31 October to 2 November 2005. The guidelines emerged from a Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration (21–25 April 1997): see MEIM/1997/D.4, Annex I.

31 Equality of Treatment (Accident Compensation) Convention, C019, adopted at 7th ILC session on 05 Jun 1925, Geneva, entry into force on 8 September 1926. It has 121 ratifications, among which are 27 EU Member States, including Bulgaria (5 September 1929) and Poland (28 February 1928).

32 Convention on Social Equality of Treatment (Social Security) Convention, C118, adopted at 46th ILC session on 28 Jun 1962, Geneva, entry into force on 25 April 1964. It has 38 ratifications, among which are seven EU Member States. Bulgaria and Poland have not ratified the convention.

Security Rights Convention (No. 157) -[33] further detailed in the Maintenance of Social Security Rights Recommendation (No. 167).[34]

Even though not all of these international instruments have been widely ratified, they can serve as a useful tool for benchmarking because their impact is not limited only to those ratifying countries.[35] For example, ILO Member States that have not ratified the migrant specific ILO instruments still apply the provisions thereof in broad terms as models in their national policies.[36] Moreover, consistency with international standards is one of the criteria for good governance in migration and the framework of international human rights and labour standards is the source for most policy measures that are designed to manage labour migration and ensure adequate protection for migrant workers.[37] Even countries of destination that are not ready to adopt the international and regional standards are urged to use these minimum norms when they are developing their national labour migration regulations.[38]

According to the ILO Multilateral Framework on Labour Migration, the protection of migrant workers requires a sound legal framework that is based on international law, which is guided by the underlying principles of the Migration for Employment Convention (Revised) (No. 97), the Migrant Workers (Supplementary Provisions) Convention (No. 143) and Recommendations Nos. 86 and 151 respectively.[39] Amongst other things, the ILO standards in relation to social security, as well as the principles contained in the ICRMW should also be considered.[40] The two ILO conventions and the ICRMW "(…) comprise and interna-

33 Maintenance of the Social Security Rights Convention, C157, adopted at 68th ILC session on 21 June 1982, Geneva, entry into force on 11 September 1986. It has four ratifications, among which are 2 EU Member States. Bulgaria and Poland have not ratified the convention.

34 Maintenance of Social Security Rights Recommendation, R167, adopted at 69th ILC session on 20 June 1983, Geneva.

35 See for example, International Labour Organization, 'International labour migration. A rights-based approach', Geneva, International Labour Office, (2010), p. 137.

36 See General Survey on the reports on the Migration for Employment Convention (Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151), 1975, Report III (Part 1B), International Labour Conference, 87th Session, Geneva (Geneva), 1999, Para. 647.

37 International Labour Organization, 'International labour migration. A rights-based approach', p. 146.

38 Ibid.

39 Principle 9 of the ILO Framework. See also Principle 4 of the ILO Framework.

40 Ibid. See also P. Taran, 'The need for a rights-based approach to migration in the age of globalisation', in R. Cholewinski, P. D. Guchteneire, and A. Pécoud (eds.), *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge: Cambridge University Press; Paris: UNESCO 2009), pp. 154-155.

tional charter on migration, providing a broad normative framework covering treatment of migrants and inter-state cooperation on regulating migration".[41]

3.3. Standards developed at the European level pertaining to circular migration

3.3.1. Council of Europe standards

This section considers the standards that have been promulgated by the Council of Europe (CoE) and identifies relevant provisions and can serve as aspirational targets when it comes to the management of rights-based circular migration.[42] Many of the European instruments that have been adopted under the auspices of the Council of Europe contain provisions with regards to migrant workers and their families, who wish to enter the territory of a Member State of the Council of Europe. This section primarily focuses on the European Convention for the Protection of Human Rights and Fundamental Freedoms[43] (ECHR), Protocol No. 1[44] thereof and some of the relevant case law of the European Court of Human Rights (ECtHR). Also considered in this section are the European Social Charter [45] and the Revised European Social Charter,[46] the European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe,[47] the European Convention on the Legal Status of Migrant Workers[48]

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41 Ibid.

42 Some of these instruments (see the footnotes below) have been ratified by a minority of Council of Europe or EU Member States. On the reasons behind the low ratification rate and their added value, see for instance E. Guild, 'The European Convention on the Legal Status of Migrant Workers (1977): an analysis of its scope and benefits', Doc. CDMG (1999) 11 (Strasbourg: Council of Europe 1999), pp. 23-28. See also R. Cholewinski, 'The Legal Status of Migrants Admitted for Employment: A Comparative Study of Law and Practice in Selected European States' , Committee of Experts on the Legal Status and Rights of Immigrants (Strasbourg: Council of Europe Publishing 2004).

43 European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5, 4 November 1950, entered in force on 3 September 1953.

44 Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 9, 20 March 1952, entry into force on 18 May 1954.

45 European Social Charter, ETS No. 35, 18 October 1961, entry in force on 26 February 1965. All EU Member States have ratified both of these Charters. Poland ratified the Charter on 25 June 1997.

46 European Social Charter (Revised), ETS No.163, 3 May 1996, entry into force on 1 July 1999. Bulgaria ratified the Revised Charter on 7 June 2000.

47 European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe, CETS No.025, 13 December 1957, entry into Force 1 January 1958. It has 17 ratifications as of February 2016, among which are 13 EU Member States. Bulgaria and Poland have not signed the agreement.

48 European Convention on the Legal Status of Migrant Workers, ETS No. 93, 24 November 1977, entry into force on 1 May 1983. It has 11 ratifications as of February 2016, among which are six EU Member States. Bulgaria and Poland have not signed the convention.

(ECMW), the European Convention on Establishment,[49] the European Convention on Social and Medical Assistance, [50] the European Code of Social Security and the Revised European Code of Social Security,[51] as well as the European Convention on Social Security.[52]

3.3.2. European Union standards

Article 6 TEU contains the general commitment of EU legislation to recognising the "rights, freedoms and principles" that are set out in the Charter of Fundamental Rights of the European Union (the EU Charter),[53] the ECHR and the general principles of EU law,[54] which may include international human rights norms.[55] Furthermore, following the entry into force of the Treaty of Lisbon, these rights, freedoms and principles have the same legal status as the Treaties.[56] Therefore, EU and national immigration law provisions must comply with the relevant human rights standards.

According to Article 51 (1) of the EU Charter, the EU institutions and bodies, as well as the Member States, are bound by its provisions, when they are implementing EU law.[57] The EU Charter applies to both EU citizens and third-country nationals that fall within the jurisdictions of the Member States.[58] It contains

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49 European Convention on Establishment, ETS No.19, 13 December 1955, entry in force 23 February 1965. It has 10 ratifications as of February 2016, among which are six EU Member States. Bulgaria and Poland have not signed the convention.

50 European Convention on Social and Medical Assistance, CETS No.014, 11 December 1953, entry into force 1 July 1954. It has 18 ratifications as of February 2016, among which are 15 EU Member States. Bulgaria and Poland have not signed the convention.

51 European Code of Social Security, CETS No.048, 16 April 1964, entry in force 17 March 1968. It has 21 ratifications, among which are 17 EU Member States. Bulgaria and Poland have not signed the code. European Code of Social Security (Revised), CETS No.139, 06 November 1990, not yet in force

52 European Convention on Social Security, CETS No.078, 14 December 1972 entry into force on 01 March 1977. It has eight ratifications as of February 2016, among which are 7 EU Member States. Bulgaria and Poland have not signed the Convention.

53 Charter of Fundamental Rights of the European Union, 18 December 2000, OJ C 364/01.

54 On the general principles of EU law, see T. Tridimas, *The General Principles of EU Law* (Second edn.: Oxford University Press 2006).

55 D. Thym and K. Hailbronner, 'Constitutional Framework and Principles for Interpretation', in K. Hailbronner and D. Thym (eds.), *EU Immigration and Asylum Law. A Commentary* (Second Edition edn.: C. H. Beck /Hart/ Nomos 2016), p. 23.

56 Article 6 (1) TEU.

57 Article 51 (1) TFEU. For a detailed interpretation on this article, see A. Ward, 'Article 51 - Field of Application', in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights. A Commentary* (CH Beck/Hart/Nomos Publishing 2014).

58 A. Wiesbrock, *Legal Migration to the European Union* (Leiden: Brill/Nijhoff, 2010), p. 165.

several rights that are relevant for the topic of circular migration between the EU and third countries, which are briefly presented in the different sub-sections of this chapter. Article 7 refers to the right to respect for family life, home and communications, which in turn corresponds to Article 8 of the ECHR. Article 15 (1) of the EU Charter sets out the right of everyone to engage in work and to pursue a freely chosen or accepted occupation. The right to social security benefits in Article 34 (2) of the EU Charter is granted to everyone who resides and is moving legally within the European Union in accordance with EU and national laws and practice. Article 33 of the EU Charter concerns the right to health care and the right to free movement and residence is enshrined in Article 45 of the EU Charter, which is also considered in this section.

According to some circular migration researchers, the free movement of workers within the EU is one of the best examples that we have for spontaneous circular migration that takes place across international boundaries.[59] Therefore, the analytical framework of this study would not be complete without also employing the EU internal market provisions with regards to free movement as another source of law that is pertinent to the management of circular migration. Even though free movement within the EU is reserved for EU citizens and their EU or third country spouses, the standards that can be extracted from the EU free movement provisions can serve as aspirational targets alongside the standards developed at the international level that were outlined in the previous section. Furthermore, adding this layer of EU standards is commensurate with the rights-based approach that is employed by this study and it resonates with the Tampere conclusions of 1999, which called for the approximation of the legal status of third-country nationals to nationals of the Member States.[60]

The freedom of movement for workers is enshrined in Article 45 TFEU and is a fundamental principle of the EU.[61] It allows EU nationals to be employed as workers in other Member States. Furthermore, since the conclusion of the Maastricht Treaty in 1992, all Member State nationals are now citizens of the European Union (Article 20 TFEU) and this status guarantees them the right to free move-

59 Skeldon, 'Going Round in Circles: Circular Migration, Poverty Alleviation and Marginality', p. 47. Newland, Mendoza, and Terrazas, 'Learning by Doing: Experiences of Circular Migration', p. 4.

60 European Council, Presidency Conclusions of the Tampere European Council, 15-16 October 1999, SN 200/99, Brussels, points 18-21. In this respect, see also Wiesbrock, *Legal Migration to the European Union.*

61 R. Geiger, D.-E. Khan, and M. Kotzur, *European Union Treaties. Treaty on European Union. Treaty on the Functioning of the European Union* (Oxford Beck/Hart, 2015), p. 327.

ment, even in cases when they are not economically active (Article 21 TFEU).[62] In line with the overall aim of this study, this chapter only focuses on the EU internal market standards that concern EU migrant workers in the policy areas identified as pertinent to circular migration. Since the free movement provisions constitute a vast area of EU law, this section only focuses on the legislation and selected case law that is relevant to EU workers and those that are deemed to be workers. Outside the scope of this section are the provisions on self-employed persons (in line with Article 49 TFEU) and service providers (Article 56 TFEU), as well as semi-economically active EU migrants, such as students, non-economically active EU citizens (in line with Article 21 TFEU) and non-migrants (Article 20 TFEU).[63]

At present, several secondary instruments bring about the freedoms set out in the Treaty on the basis of Article 46 TFEU and, as a consequence, must be considered – the Citizens' Rights Directive 2004/38/EC,[64] consolidating the secondary legislation in the field[65] and introducing the right to permanent residence for EU citizens and their families, and Regulation No. 492/11 concerning workers,[66] replacing the original Regulation No. 1612/68, as well as Directive 2014/54[67] which aims to enforce the existing legislation under Article 45 TFEU.[68] The Citizens' Rights Directive applies to all EU citizens, regardless of whether they are economically active or not. The Citizens' Rights Directive is based on the idea of different degrees of integration, with the rights enjoyed increasing the longer the EU citizen is in a host Member State.[69] By way of contrast, EU migrant

62 C. Barnard, 'Free movement of natural persons', in C. Barnard and S. Peers (eds.), *European Union Law* (Oxford University Press 2014), p. 357.

63 I use the classification proposed in ibid., p. 371.

64 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77.

65 Directive 2004/38/EC replaced, among others, Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [1968], OJ L 257, Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State [1970] OJ L 142, and Articles 10 and 11 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257.

66 Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141.

67 Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers [2014] OJ L 128.

68 For background information to Directive 2004/38/EC, see Elspeth Guild, Steve Peers, and Jonathan Tomkin, *The EU Citizenship Directive. A Commentary* (Oxford University Press 2014).

69 C. Barnard, *EU Employment Law* (Fourth edn., Oxford European Union Law Library: Oxford University Press, 2012), p. 158.

workers enjoy the rights enshrined in the Treaty from their first day in the host Member State.[70] Yet, most of the existing secondary legislation continues to apply to workers and therefore it must be analysed together with the Citizens' Rights Directive, as and when this is appropriate.

In addition, the standards concerning social security coordination should also be taken into consideration. These standards are contained in Regulation No. 883/2004 of the European parliament and the Council of 29 April 2004 on the coordination of social security systems, Implementing Regulation No. 987/2009 and Directive 2014/50 on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights. Finally, this section will also refer to the Professional Qualifications Directive 2005/36/EC providing for the system of recognition of professional qualifications in the EU, which was recently amended by Directive 2013/55/EC.

3.4. Specific policy instruments for the implementation of the standards developed at the international and at the European level concerning circular migration

As was demonstrated in Chapter 1 when the term "circular migration" entered on to the agenda of international organisations, this notion attracted the attention of academics and policy analysts, who started to examine the new perception of circular migration as migration management tool. In the past decade, they have not only contributed to the understanding of the content and typology of circular migration, but they have also formulated potential policy routes that are essential for turning circular migration into a successful migration management tool. Their conclusions, drawn on the basis of the analysis of the experience of past and present policy models, can be summarised in one word - "flexibility" - which is inherent in the pattern of spontaneous circular migration (see Table 3.1 below). Therefore, understanding how the spontaneous pattern of circular migration works "(…) is perhaps the most valuable source into program design".[71]

On the basis of the review of lessons learned from the failure of the guest-worker models and the new generation of temporary and circular migration policies, the analysis of which was carried out in Chapter 2, as well as the academic and policy

70 Ibid.
71 Newland, Mendoza, and Terrazas, 'Learning by Doing: Experiences of Circular Migration', p. 1.

literature on circular migration management, this chapter also outlines the policy elements that are conducive to successful circular migration management, which in turn compliments the identified standards developed at the international and at the European level and can support their implementation. They are presented in each policy area, following the identified standards, which are employed as benchmarks.

	The Usual Path: Maintaining Ties to Countries of Origin	**The Road Less Travelled:** Maintaining Ties to Countries of Destination
Permanent Migrants (including Members of Diaspora)	Provision of Return Incentives: focus mainly on the highly-skilled migrants	Removing Disincentives to Circulation – Flexible residency and citizenship rights – Portable benefits – Accessible information
Temporary Migrants	Restrictive temporary worker schemes with particularly strong return provisions and stiff penalties for over stayers	Flexible and open working arrangements – More flexible contracts – Options of re-entry – Portability of visas – Building skills and entrepreneurship

Table 3.1. Circular Migration Policy Routes. Source Newland (2007) [72]

3.5. Entry and re-entry conditions

3.5.1. Standards developed at the international level

It is a well-established principle of positive international law that states have the primary authority to regulate and control the entry of persons on their territory due to their sovereignty.[73] Even though states do have a wide margin of appreciation in this regard, there are, nevertheless, international norms regulating the entry of migrants.[74] According to international law instruments, everyone has the right to return to his or her own country and to leave any country, including one's own country. These rights are explicitly provided for in Article 13 of the UDHR and Article 12 of the ICCPR. The UN Human Rights Committee, responsible for monitoring the application of the ICCPR, has interpreted the phrase "the right to

72 K. Newland and D. R. Mendoza, 'Circular Migration and Development: Trends, Policy Routes and Ways Forward', Policy Brief, April 2007 (2007), p. 9.

73 Chetail, 'The Transnational Movement of Persons under General International Law: Mapping the Customary Law Foundations of International Migration Law', pp. 27-28.

74 Ibid., p. 2.

enter his own country", that is stipulated in Article 12 (4) of the ICCPR, broadly compared to the concept "country of his nationality" so as to include different categories of long-term residents.[75] Furthermore, the committee made clear that everyone, including migrants, has the freedom to leave the territory of any state and this "may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country".[76] Article 8 of the ICRMW also stipulates a right to leave any country and to return to one's own country for migrant workers and their families. Additionally, these rights are also included in Article 2 (2) and Article 3 (2) of Protocol No.4 to the ECHR.

Nevertheless, international law does not explicitly establish a right to enter another country,[77] because states have the prerogative to determine, based on their national sovereignty, who are the categories of non-citizens that are entitled to enter, stay and work on their territory. This is explicitly stipulated in Article 79 of the ICRMW. Accordingly, states can limit or deny access and remove unauthorised migrants from their territory. This, however, must be done in accordance with states' human rights obligations, including *inter alia* adherence with the right to liberty and security, the right to family and private life and the prohibition against arbitrary arrest, detention and expulsion.[78] Moreover, the UN Human Rights Committee stresses that the enjoyment of the right to leave any country can be restricted only to protect national security, public order, public health or morals and the rights and freedoms of others (Article 12, Para 3 of the ICCPR). Permissible restrictions "must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant".[79] In addition, they must be compliant with the principle of proportionality.

In terms of re-entry conditions, Part V of the ICRMW provides specific rights for seasonal workers, who as mentioned above may also be circular migrants. According to Article 59 (2) of the ICRMW, the contracting state shall consider giving seasonal workers, who have already been employed on its territory for a

75 UN Human Rights Committee, General Comment No. 27, Freedom of Movement (Article 12), U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999), Para. 20.

76 UN Human Rights Committee, General Comment No. 27, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999), Para. 8.

77 UN Human Rights Committee, ICCPR General Comment No. 15, The Position of Aliens Under the Covenant, 11 April 1986, Paras. 5 and 6.

78 International Labour Office, Office of the United Nations High Commissioner for Human Rights, and Inter-Parliamentary Union, 'Migration, human rights and governance', p. 125.

79 UN Human Rights Committee, General Comment 27, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999), Para. 11.

substantial period of time, priority over other workers who seek admission to that state, subject to any applicable bilateral and multilateral agreements.

In addition, amongst the ILO instruments, one of the principles of the non-binding ILO Multilateral Framework on Labour Migration pertains to entry and re-entry conditions with regards to circular migration. Principle 15 states, that "the contribution of labour migration to employment, economic growth, development and the alleviation of poverty should be recognized and maximized for the benefit of both origin and destination countries".[80] The principle is followed by several guidelines that aim to give it a practical dimension, among which Guideline 15.8 provides for "adopting policies to encourage circular and return migration and reintegration into the country of origin, including by promoting temporary labour migration schemes and circulation-friendly visa policies".

3.5.2. Standards developed at the European level

3.5.2.1. Council of Europe standards

Even though international law does not establish a right to enter another country, in line with their sovereign right, states also derive obligations to admit and re-admit third-country nationals by means of international agreements. At the European level, for example, the European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe aims to facilitate the personal travel of nationals of the contracting parties.[81] This instrument, however, only applies to visas that have been granted for no longer than three months. Besides, Article 4 of the European Convention on the Legal Status of Migrant Workers establishes a right of admission for migrant workers, once they are authorised to take up paid employment on the territory of a contracting party and have obtained the necessary papers. In addition, Article 1 of the European Convention on Establishment - again limited to nationals of the Council of Europe Member States -, aims to facilitate the entry into the territory of the contracting parties for the purposes of temporary visits. Accordingly, each contracting party is obliged to permit nationals from other contracting states to travel freely within

80 ILO Multilateral Framework on Labour Migration. Non-binding principles and guidelines for a rights-based approach to labour migration, 2006.

81 Article 1 of European Agreement on Regulations governing the Movement of Persons between Member States.

its territory except when this would be contrary to *ordre public*, national security, public health or morality.

3.5.2.2. European Union standards

Directive 2004/38/EC stipulates the conditions of exit and entry for EU citizens, including workers. This right is also enshrined in Article 45 of the EU Charter.[82] According to Articles 4 and 5 of Directive 2004/38/EC, all Union citizens with a valid identity card or a passport have the right to leave and enter the territory of a Member State. Directive 2004/38/EC explicitly forbids the imposition of entry or exit visas or equivalent measures to persons that are entitled to free movement within the Union (Article 2 (2) and Article 5 (1) of Directive 2004/38/EC), as the freedom to travel without any visa restrictions is at the heart of the European Union project. [83] Therefore, EU migrant workers have the freedom to engage themselves in spontaneous circular migration projects between their countries of origin and destination. On the contrary, the requirement for third-country nationals to apply for a visa can constitute a major obstacle to any type of movement, even before the journey has started and it can thus discourage potential migrants.[84]

Furthermore, Article 16 (3) of Directive 2004/38/EC contains a provision, clarifying that the continuity of residence is not interrupted by temporary absences not exceeding a total of six months per year, by absences of a longer duration for the purposes of compulsory military service, or by one absence of a maximum of twelve consecutive months for reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or third country.[85] When an EU citizen acquires the right of permanent residence, such a status can only be lost through absence from the host Member State for a period exceeding two consecutive years (Article 16 (4) of Directive 2004/38/EC). The freedom to leave a host Member State and then return guarantees the continuation

82 For more details see, E. Spaventa, 'Article 45 - Freedom of Movement and of Residence', in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights. A Commentary* (CH Beck/Hart/Nomos Publishing 2014).

83 The right to entry and residence can be restricted only on grounds of public policy, public security or public health (Articles 27-33 of Directive 2004/38/EC), which will not be discussed here, since it falls outside of the study's focus.

84 K. Eisele, *The External Dimension of the EU's Migration Policy. Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective* (Brill | Nijhoff, 2014), p. 278.

85 However, periods of imprisonment in the host Member State would interrupt the continuity of residence. See Case C-378/12 - Onuekwere v. SSHD, ECLI:EU:C:2014:13.

of circulation and does not "lock in" in EU migrants to the territory of only one Member State.

3.5.3. Standards employed as benchmarks of the analytical framework of this study

What do these standards mean with regard to the management of circular migration? In general terms, they provide that migrants can leave and return to their countries of origin. Furthermore, when circular migrants have either a permanent or long-term status, they also have the right to return to their country of destination. In addition, the ICRMW contains provision for seasonal migrants, who may also be circular migrants, thereby facilitating the re-entry conditions for this category of workers by granting them priority over other workers. The CoE instruments, as well as the non-binding ILO Framework, also provide for the facilitation of circular migration for citizens of the contracting states on the basis of visas and right to admission, once the migrant has been granted authorisation for employment. In the case of the EU, free movement is provided without any visa restrictions on EU citizens. These are standards that are conducive to rights-based circular migration, allowing for a migrant-led trajectory and they are therefore employed as part of the framework of analysis of this study (see Annex V).

3.5.4. Instruments for the implementation of the benchmarks

In order to be able to circulate, migrants need to have the opportunity to continue to move back and forth back between their countries of origin and destination after their initial return.[86] This means that policy measures should be in place to enable migrants to benefit from facilitated access to the host country. Measures in this regard would also ensure return to the country of origin and prevent overstaying because they provide guaranteed re-entry to the country of origin. Moreover, if they are flexible enough, they can lower re-entry costs. Without this policy element in place, migrants will not have enough incentives to return to

86 See also K. Newland, 'Circular Migration and Human Development', UNDP Human Development Reports, 42, (2009), p. 1.; ICMPD, 'Prague Process Handbook on Managing Labour and Circular Migration', (2014), p. 49.

their country of origin and would even rather prefer to remain irregularly in the country of destination.[87]

Multi-entry visas and visa-free regimes are the instruments that, according to the academic and policy literature, can support the implementation of the aforementioned re-entry benchmarks. In order to foster circular migration and enable migrants to travel back and forth between their country of origin and destination, in its Communication "Migration and Development: Some concrete orientations" the European Commission stressed the need for granting the returnees a multi-entry visa which allows them to return to their former country of residence.[88] Policy measures in this regard were also recommended by the Global Forum on Migration and Development, giving multiple-entry visas as a good practice for facilitate circularity,[89] as well as by the OECD Development Centre. [90]

Moreover, introduction of visa-free regimes on the basis of bilateral or multilateral cooperation is another policy option that can facilitate circulation and re-entry into the host country. As was already mentioned, circular migration occurs when individuals are entitled to free movement across international boundaries according to Skeldon, using as an example the case of the EU. [91] Newland et al. also underline that spontaneous circular migration is the norm where national borders are open by agreement or where governments do not enforce borders.[92] Furthermore, the CARIM – East Research Consortium - identifies that one of the factors that fosters circular migration within the Commonwealth of Independent States (CIS) is the existence of visa-free regimes for CIS nationals based on "net of bilateral and multilateral agreements".[93]

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87 See also H. Schneider and A. Wiesbrock, 'Circular migration: A triple win situation? Wishful thinking or a serious option for suitable migration policy?', in D. Schiek, U. Liebert, and H. Schneider (eds.), *European Economic and Social Constitutionalism after the Treaty of Lisbon* (Cambridge: Cambridge University Press, 2011), p. 137. See also J. Dayton-Johnson et al., 'Gaining from Migration. Towards a New Mobility System', OECD Development Centre (2007), p. 44.

88 European Commission Communication, 'Migration and Development: Some concrete orientations' COM (2005) 390 final 25, Brussels, 1 September 2005.

89 Global Forum on Migration and Development, 'Report of the first meeting of the Global Forum on Migration and Development, 9-11 July 2007, Brussels', (2008), p. 78.

90 Dayton-Johnson et al., 'Gaining from Migration. Towards a New Mobility System', p. 25.

91 R. Skeldon, 'Going Round in Circles: Circular Migration, Poverty Alleviation and Marginality', *International Migration,* 50/3 (2012), p. 47.

92 K. Newland, D. R. Mendoza, and A. Terrazas, 'Learning by Doing: Experiences of Circular Migration', Migration Policy Institute, Insight, September (2008), p. 4.

93 A. D. Bartolomeo et al., 'Circular Migration in Eastern Partnership Countries An overview', CARIM-East Research Report 2012/30, (2012), p. 8.

Finally, the benchmark related to the right of permanent/long-term migrants to return to their country of destination can be implemented through permits that allow periods of absence**,** thereby enabling migrants to return to their home country. This benchmark concerns two policy areas – re-entry and residence status (see Annex V). According to international organisations and academics, the more secure the status of migrants in the country of destination is, the more likely they will be to engage in circular migration.[94] However, security of status does not only relate to having the right to permanent residence, but it also involves being able to maintain them while absent from the territory of the country of destination. Flexible residence permits allowing longer periods of absence from the host country will enable circular migrants with different professional backgrounds to economically engage with their country of origin in the long run, without fearing the loss of their permanent residence status.

3.6. Work authorisation

3.6.1. Standards developed at the international level

As was already demonstrated in the section on the policy issues at stake with circular migration, the type of work permit is an issue which can influence the capability of migrants to circulate. International human rights law, specifically Article 23 of the UDHR and Article 6 (1) of the ICESCR, protects the rights of everyone to seek employment feely (but not to obtain such), regardless of their nationality. However, states can differentiate between nationals and non-nationals if they pursue a legitimate state objective that is justifiable on the basis of the principle of proportionality, such as for example the protection of the national workforce.[95] Such types of restrictions are provided for in Article 52 (2) of the ICRMW and in Article 14 of the ILO Migrant Workers Convention (No. 143).

Thus, a state can tie foreign workers to employment in one industry or occupation, but such restrictions cannot be maintained for more than two years according to Article 14 (a) of the ILO Migrant Workers Convention (No. 143) and Article 52 (3)(a) of the ICRMW. Moreover, Article 59 (2) of the ICRMW stipulates that contracting states shall consider granting seasonal workers, who have already

94 See for example ICMPD, 'Prague Process Handbook on Managing Labour and Circular Migration', p. 57.

95 Baruah and Cholewinski, 'Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination', p. 135.

been employed in their territory for a significant period of time, the possibility of taking up other remunerated activities, subject to the applicable bilateral and multilateral agreements. The ILO's Committee of Experts on the Application of Conventions and Recommendations also underlines that providing appropriate flexibility for migrant workers to change their employer or their workplace assists in avoiding situations in which they become particularly susceptible to discrimination and abuse.[96] Furthermore, "giving temporary migrants the right to transfer from one job to another during the period of their work permit, thereby enabling them to respond to changing labour market conditions and avoid a dependence on unscrupulous employers" is among one of the Global Commission on International Migration's (GCIM) Recommendations.[97]

Another important international standard pertaining to circular migration is that the loss or termination of employment should not constitute a sole ground for the withdrawal of migrant worker's authorisation of residence or work permit, which is stipulated in Article 8 (a) of ILO Migrant Workers Convention (No. 143) and Article 49 (2) of the ICRMW. Additionally, migrant workers shall be given the possibility to find alternative employment.[98] According to Article 51 of the ICRMW, this international standard is also applicable to migrant workers who cannot freely choose their remunerated activity, unless "where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted". However, they are also entitled to seek alternative employment in the remaining period of their authorisation to work, subject to the conditions and limitations that are specified in the work authorisation permit.

3.6.2. Standards developed at the European level

3.6.2.1. Council of Europe standards

The (Revised) European Social Charter stipulates, in Article 18 thereof, the right to engage in a gainful occupation on the territory of another contracting party, subject to the same restrictions mentioned above. With regard to restrictions on

96 Report III (1B): Giving globalization a human face. General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, ILC.101/III (1B), Equality of opportunity and treatment in employment and occupation (Convention No. 111), p. 325, Para 779. See also Article 4 of Guidelines on special protective measures for migrant workers in time-bound activities.

97 GCIM, 'Migration in an Interconnected World: New Directions for Action. Report of the Global Commission on International Migration', (2005), p. 18.

98 Article 8 (b) of ILO Convention No. 143 and Article 49 (3) of the ICRMW.

changing employer, Article 8 (2) of the European Convention on the Legal Status of Migrant Workers[99] (ECMW) provides a more liberal approach compared to other international instruments: "a work permit issued for the first time may not as a rule bind the worker to the same employer or the same locality for a period longer than one year".

3.6.2.2. European Union standards

Article 15 of the EU Charter concerns the freedom to choose an occupation and the right to engage in work. It addresses two different beneficiaries: firstly, "the broadest manifestation of the right to work" enshrined in Article 15 (1) is enjoyed by "everyone" and secondly, the freedom to engage in cross-border work across the territory of the Member States, reserved for EU citizens, which is stipulated in Article 15 (2) and also in the TFEU.[100] By way of contrast, third-country nationals are excluded from this right and do not have free access to the national labour markets. However, once they acquire authorisation to work in a Member State, there are to be granted equal treatment with EU citizens in respect of working conditions (Article 15 (3) of the EU Charter).[101]

Article 45 (1) TFEU provides that "freedom of movement for workers shall be secured within the Union". The term "worker" is an autonomous concept of EU law[102] that has been defined and consistently broadened through the jurisprudence of the Court of Justice of the European Union (CJEU).[103] In its case law, the CJEU has clarified that an EU worker is a person who pursues employment activities, which are effective and genuine. [104] Activities on such a small scale as to be regarded as "purely marginal and ancillary" are excluded from the scope of this definition, however. [105] Moreover, in order for the employment to fall within the scope of Article 45 TFEU, there must be a relationship of subordination in

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99 European Convention on the Legal Status of Migrant Workers, ETS No. 93, 24 November 1977, entry into force on 1 May 1983.

100 D. Ashiagbor, 'Article 15 - Freedom to Choose an Occupation and Right to Engage in Work', in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights. A Commentary* (CH Beck/Hart/Nomos Publishing 2014), p. 425.

101 Ibid.

102 See Case C-53/81 - Levin v Staatssecretaris van Justitie, ECLI:EU:C:1982:105, Para. 11.

103 Paul Craig and Gráinne de Búrca, *EU Law.Text, Cases, and Materials* (Sixth Edition edn.: Oxfford University Press 2015), p. 749. See also Barnard, *EU Employment Law*, p.148

104 Paul Craig and Gráinne de Búrca, *EU Law.Text, Cases, and Materials*, p. 749. Geiger, Khan, and Kotzur, *European Union Treaties. Treaty on European Union. Treaty on the Functioning of the European Union,* p. 331.

105 Case C- 337/97 – Meeusen, ECLI:EU:C:1999:284.

return for which the person receives remuneration.[106] The sphere and nature of the relationship between an employer and an employee are not decisive for the application of Article 45 TFEU.[107]

The freedom of movement of workers entails the rights, subject to certain limitations, to accept offers of employment (Article 45 (3)(a) TFEU) and to move freely within the territory of the Member States for the purposes of employment (Article 45 (3)(b) TFEU). Regulation No. 492/2011 further details the provisions that aim to attain these objectives through the abolition of any discrimination based on nationality between workers of the Member States in relation to employment, remuneration and other conditions of work and employment.[108] Thus, EU workers have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that Member State (Article 1 (1) of Regulation No. 492/2011). They must be treated in the same way as national workers in respect of any conditions of employment (Article 7 (1) of Regulation No. 492/2011). Therefore, EU workers are not required to apply for work authorisation, as they have free access to employment in all sectors and occupations (subject to the limitations contained in Article 6 (2) of Regulation No. 492/2011) and thus cannot be tied to an employer or a sector for certain period of time.

In addition, Article 7 (3) of Directive 2004/38/EC regulates the position of EU workers who have become involuntarily unemployed, but nevertheless retain some of the rights derived from this status. Even though involuntarily unemployed job seekers are not fully-fledged workers, they enjoy a residence right during the period in which they are seeking employment and can enjoy certain

106 See Case C-66/85 - Lawrie-Blum v. Land Baden-Württemberg, ECLI:EU:C:1986:284, Para. 16. For case law analysis, see Paul Craig and Gráinne de Búrca, *EU Law.Text, Cases, and Materials*, p. 749. See also Geiger, Khan, and Kotzur, *European Union Treaties. Treaty on European Union. Treaty on the Functioning of the European Union,* p. 331.

107 Barnard, *EU Employment Law*, p. 149.

108 Recital 2 and 3 of the Preamble.

benefits which enable them to access employment.[109] Furthermore, according to the case law of CJEU, Article 7 (3) of Directive 2004/38/EC also covers workers who temporarily interrupted their employment, without looking for another job and who can also continue to benefit from this status.[110]

3.6.3. Standards employed as benchmarks of the analytical framework of this study

The EU provisions of free movement are conducive to the spontaneous circularity of EU migrant workers, without any requirement to obtain a work permit and given that there are no restrictions on working within a particular sector with a given employer (although restrictions on public service can be imposed on the basis of Article 45(4) of Directive 2004/38/EC). Their contracts can be continued in line with the national labour legislation, in case the employer wishes to extend their period of employment, and this is done without any limitations contained in work permits or quotas. In cases of abuse by the employer, EU migrants are free to change job. Moreover, in case of unemployment, EU migrant workers have the flexibility to look for another job within a reasonable period of time, without risking their resident status. Thus, they have a chance to maintain their circulation project without the possible financial losses that are related to an unwanted and early return to their home Member State.

By way of contrast, there are no international or other regional standards which prevent states from binding migrant workers, including circular migrants, to a

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109 Paul Craig and Gráinne de Búrca, *EU Law.Text, Cases, and Materials*, p. 771 See Case C-85/96 -Martínez Sala v. Freistaat Bayern, ECLI:EU:C:1998:217, Para. 32; Case C-138/02 - Collins v. Secretary of State for Work and Pensions, ECLI:EU:C:2004:172, Para. 29. For the job-seeking benefits, see Case C-22/08 - Vatsouras and Koupatantze, ECLI:EU:C:2009:344. This is possible in four cases, where job-seekers: are temporarily unable to work as the result of an illness or accident; are in involuntary unemployment after having been employed for more than one year and have registered as a job-seeker with the relevant employment office; are in involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first 12 months and has registered as a job-seeker with the relevant employment office. In cases like this one, the status of worker is retained for no less than six months; embark on vocational training. In such cases, unless the worker is involuntarily unemployed, the retention of the status requires the training to be related to the previous employment. For the CJEU case law, which this provision codified, see C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (Fifth edn.: Oxford University Press 2016), p. 243.

110 See Case C-67/14 – Alimanovic, ECLI:EU:C:2015:597 and Case C-507/12 - Saint Prix, ECLI:EU:C:2014:2007. For more details, see H. Verschueren, 'Being economically active: how it still matters', in H. Verschueren (ed.), *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong*, (Antwerp: Intersentia, 2016), pp. 206-208.

certain employer or occupation. However, they stipulate that if such a restriction exists, then this should only be for a maximum of one to two years. An exception in this regard is Article 52 (3) (b) of the ICRMW, which sets the limit to more than five years "in case of pursuance of a policy of granting priority to its nationals or to persons who are assimilated to them for these purposes by virtue of legislation or bilateral or multilateral agreements". Therefore, this provision is not included in the benchmark framework because it is considered as a hindrance to rights-based circularity. The impossibility to change employment and occupation for such a long period of time naturally leaves employers with too much control over the employees.[111] This can increase the risk of exploitation and abuse of migrant workers.

Furthermore, as was demonstrated by the universal and regional instruments, loss or termination of employment should not constitute the sole ground for the withdrawal of a migrant worker's residence or work permit. Regarding circulating seasonal workers, the ICRMW stipulates the possibility of taking up other remunerated activities.

All of these provisions are employed as benchmarks (see Annex V). They are important in relation to circular migration, not only because they help obviate abuse, but also because they provide circular migrants with a certain degree of flexibility to move back and forth and make the most of their stay in the destination country.

3.6.4. Instruments for the implementation of the benchmarks

Giving temporary migrants, who can also be engaged in circular migration, the right to transfer from one job to another during the period of their work permit is an instrument that can ensure the implementation of the aforementioned benchmarks. It is recommended by the ILO's Committee of Experts on the Application of Conventions and Recommendations that providing migrant workers with flexibility to change their employer or their workplace assists in avoiding situa-

111 See also Baruah and Cholewinski, 'Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination', p. 115.

tions whereby they become particularly vulnerable to discrimination and abuse.[112] Furthermore, this instrument is also among the Recommendations of the GCIM[113] (see Annex V).

3.7. Residence status

3.7.1. Standards developed at the international level

According to the international law standards, individuals are entitled to free movement within the country, where one is lawfully resident, and the right to choose his or her residence.[114] As was already mentioned above, states determine whether a foreigner's stay on the territory is "lawful" on the basis of their domestic law, and they can restrict the entry of a foreigner to their territory.[115] Yet, states cannot make the right to free movement and choice of residence "dependent on any particular purpose or reason for the person wanting to move or to stay in a place".[116] In addition, they have an obligation to ensure that the rights guaranteed by Article 12 of the ICCPR are protected, not only from public, but also from private interference, which is particularly important in relation to circular migrants, especially in low-skilled and ineffectively regulated sectors of employment, such as seasonal and domestic work.[117] These rights are important with regard to sectors that "lock in" low and medium-skilled circular migrants, as well as seasonal and domestic workers. However, in most of the cases, if the migrants are tied to a certain employer and/or occupation, they cannot effectively enjoy those rights.

In terms of residence permits, Article 49 (1) of the ICRMW stipulates that when the national legislation requires two different authorisations for residence and

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112 Report III (1B): Giving globalization a human face. General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, ILC.101/III(1B), Equality of opportunity and treatment in employment and occupation (Convention No. 111) 325, Para. 779. See also Article 4 of Guidelines on special protective measures for migrant workers in time-bound activities.

113 Martin Ruhs, 'The potential of temporary migration programmes in future international migration policy' (Report prepared for the GCIM 2005), p. 17 – 18.

114 Article 12 (1) of the ICCPR, Article 39 of the ICRMW, Article 2 (1) of the Fourth Protocol to the ECHR.

115 Human Rights Committee, General Comment 27, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999), Para. 4.

116 Human Rights Committee, General Comment 27, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999), Para. 5.

117 For the permissible restrictions, see Article 12, Para. 3, above.

employment, the states of employment shall issue a residence permit to migrant workers "for at least the same period of time as their authorisation to engage in remunerated activity".

3.7.2. Standards developed at the European level

3.7.2.1. Council of Europe standards

Among the Council of Europe instruments, Article 9 (2) of the ECMW contains similar stipulations to Article 49 (1) of the ICRMW. In addition, the European Convention on Establishment[118] (ECE) stipulates an important provision with regards to residence status: that each party shall also facilitate the prolonged or permanent residence of nationals of the other parties in its territory (Article 2 of the ECE).

3.7.2.2. European Union standards

As per EU internal market law, the right of residence is an essential flanking right that is necessary in order to exercise free movement rights for workers.[119] This right is enshrined in Article 45(3)(c) TFEU and is further detailed by the provisions of Directive 2004/38/EC. It is also reproduced in Article 45 (1) of the EU Charter.[120] EU citizens have the right to stay in a Member State for the purpose of employment in accordance with the respective national law (Article 45 (3) (c) TFEU) and to remain in the territory of a Member State after having been employed in that Member State, subject to certain conditions (Article 45 (3)(d) TFEU).

Article 6 of Directive 2004/38/EC provides for an initial right of residence for up to three months to all EU citizens, without any other conditions than the requirement to hold a valid identity card or passport. After this initial period of three months, according to Article 8 of Directive 2004/38/EC, the host Member State may require EU workers to register with the relevant authorities. This should be

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118 European Convention on Establishment, ETS No.19, 13 December 1955, entry in force 23 February 1965.

119 Geiger, Khan, and Kotzur, *European Union Treaties. Treaty on European Union. Treaty on the Functioning of the European Union,* p. 337.

120 For more details on the interpretation of Article 45 of the EU Charter, see Spaventa, 'Article 45 - Freedom of Movement and of Residence'.

done following the presentation of a valid identity card or passport, confirmation of engagement from the employer or a certificate of employment. Failure to comply with this registration requirement may lead to sanctions against the person, which must be, however, "proportionate and non-discriminatory" (Article 8 (2) of Directive 2004/38/EC). The right of residence covers the whole territory of the host Member State,[121] unless there are restrictions, which are applied in the same way to the nationals of the Member State (Article 22 of Directive 2004/38/EC). In addition, the CJEU in *Levin* demonstrated that the motives that have prompted the worker to seek employment in another Member State are of no relevance in relation to his right to enter and reside, if he or she wishes to pursue an effective and genuine activity there. [122]

EU citizens have the right to remain on the territory of the Member State where they have worked on the basis of Articles 16 and 17 of Directive 2004/38/EC,[123] which respectively provide for the right to permanent residence when certain conditions have been satisfied.[124] EU citizens who have resided legally on the territory of the Member State for a continuous period of five years have the right to obtain permanent residence in that Member State (Article 16 (1) of Directive 2004/38/EC) and this is not subject to any of the conditions provided for in relation to residence up to and after three months (Chapter III of Directive 2004/38/EC). In line with the *Ziolkowski and Szeja*[125] and *Dias* cases,[126] only those periods of lawful residence which have been spent, *inter alia*, as a worker, family member of a worker or an EU citizen with sufficient resources are to be considered in the computation of the requisite five-year period.[127]

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121 The provision is based on Case 35/75 - Rutili, ECLI:EU:C:1975:137, Para. 46, 49, which was codified by the Directive.

122 Case 53/81- Levin, ECLI:EU:C:1982:105, Para. 23. Economically inactive EU citizens are outside the scope of this section. For their right to retention of residence, see A. Tryfonidou, *The impact of Union citizenship on the EU's market freedoms.* (Modern Studies in European Law; Oxford: Hart Publishing 2016), pp. 36 - 43. And Paul Craig and Gráinne de Búrca, *EU Law.Text, Cases, and Materials*, pp. 875-876.

123 It should be noted that Article 17 of Directive 2004/38/EC provides for a shorter period for some workers to obtain the right to permanent residence. On the right to remain for family members, see Article 7 (3) of Directive 2004/38/EC.

124 The right to remain was formerly regulated by Regulation (EEC) No. 1251/70 on the right of workers to remain on the territory of a Member State after having been employed in that State (repealed by Regulation (EC) No. 635/2006 of 25 April 2006). The Directive replaced and further amended these provisions.

125 Joined Cases C-424/10 and C-425/10 - Ziolkowski and Szeja, ECLI:EU:C:2011:866.

126 Case C-325/09 - Dias, ECLI:EU:C:2011:498.

127 Paul Craig and Gráinne de Búrca, *EU Law.Text, Cases, and Materials*, p. 883.

3.7.3. Standards employed as benchmarks of the analytical framework of this study

As this section has demonstrated, the international law standards on free movement and choice of residence are important in relation to those sectors that "lock in" low- and medium-skilled circular migrants, as well as seasonal and domestic workers. However, in most of the cases, migrants are tied to a certain employer and/or sector, and they cannot therefore effectively enjoy these rights. Concerning residence permits, there are almost no international law standards regulating the transition from temporary to permanent status, except for certain provisions of the ECE which pertain, however, only to citizens of the contracting parties. By way of contrast, EU migrant workers enjoy flexibility in relation to their residence status. They can accumulate residence rights, which after a continuous period of five years or less, for certain categories of workers, entitles them to a right of permanent residence in the host Member State. Facilitated access to permanent residence favours continuous circulation and it is therefore employed by this study as a benchmark in this policy field.

Even though universal human rights instruments allow migrants who have permanent/long-term status to return to their country of destination, they are no provisions concerning periods of absence from the respective country. Such a provision, however, is provided for in EU internal market law. Once obtained, the right to permanent residence can only be lost after a period of absence that exceeds two consecutive years, which in turn permits circulation back and forth between the host and home Member States. The provision that allows absence from the territory of the host country for a duration of up to two consecutive years, is considered as a suitable aspirational standard in relation to rights-based circular migration and therefore it is employed as part of this study's analytical framework.

3.7.4. Instruments for the implementation of the benchmarks

At the beginning of their migratory project, migrants frequently decide to migrate temporarily, but over the course of time, their life goals change due to professional or personal commitments, and their temporary movement very often turns into permanent settlement. [128] In certain sectors, employers invest resources in

128 See also S. Castles and D. Ozkul, 'Circular Migration: Triple Win, or a New Label for Temporary Migration?', in G. Battistella (ed.), *Global and Asian Perspectives on International Migration* (Global Migration Issues; Switzerland Springer International Publishing, 2015), p. 44.

training migrants and they eventually wish to retain experienced migrants for longer periods by extending their contracts. [129] If there are no legal possibilities for circular migrants to extend their temporary permits to more long-term permits, this could push workers and employers into the informal economy and disrupt circulation in its initial stage.

Permits that allow a transfer from a temporary status to permanent residence right is an instrument that can be used to facilitate access to a more permanent status. This is mostly problematic in the case of specially designed "time-bound labour migration" policies, which do not entitle migrants to accumulate rights for the purposes of ascertaining a permanent residence status.[130] The transit to a permanent residence permit in this case could be made conditional on the successful accomplishment of one or more assignments in the destination country. [131] If migrant workers follow the administrative rules, return to their home country and re-enter legally, and demonstrate willingness to stay for a longer period of time in the country of destination, for instance, by learning the language, this could serve as basis for opening up a path to permanent residence.

3.8. Social security coordination

3.8.1. Standards developed at the international level

General international human rights law endows everyone, as a member of a society, with the right to social security (Article 22 of the UDHR and Article 9 of the ICSECR).[132] In addition, Article 25 of the UDHR elaborates upon the scope of the concept "social security", which provides for an open-ended list of social risks: [133] "[e]veryone has (…) the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control". In addition, Article 9 of the ICESCR specifies that social security also includes social insurance, meaning insurance-type benefits that are accessible to beneficiaries on the basis of contributions.[134]

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129 See also Baruah and Cholewinski, 'Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination', p. 100.

130 See ibid., pp. 116- 129.

131 Jeff Dayton-Johnson et al., 'Gaining from Migration. Towards a New Mobility System', p. 45.

132 See also General Discussion on Social Security at the International Labour Conference in 2001, Para. 2.

133 J. V. Langendonck, 'The meaning of the right to social security', in J. V. Langendonck (ed.), *The Right to Social Security* (Intersentia, 2007), p.5.

134 Ibid., p. 6.

The right to health care without any distinction based on nationality or legal status is provided for in Article 25 of the UDHR and Article 12(1) of the ICESCR.[135] According to the interpretative rules on the ICESCR, states are obliged to "take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights".[136] Furthermore, the ICRMW provides specific standards in this area for the purposes of migrant workers. Articles 27 and 28 of the ICRMW stipulate that all migrant workers and their family members shall enjoy equal treatment with nationals in relation to social security and emergency medical care, and Articles 43(1)(e) and 45(1)(c) of the ICRMW stipulate the rights to social and health services to regular migrants and their families, provided that they have met the requirements for participation in the respective schemes.

The ILO also plays an important role in the establishment of social security standards, as part of its international labour standards. ILO standards "serve as worldwide agreed guidelines or benchmarks for the adoption of national social policies and when ratified, they prevent countries from backsliding".[137] The ILO's flagship Convention on Social Security (No. 102) (Social Security Minimum Standards) that was adopted in 1952 sets minimum standards for nine branches of social security. In addition, there are other contemporary conventions providing for core standards in the ambit of social security, such as the Convention on pensions (No. 128), Convention on medical care (No. 130), Convention on employment injury (No. 121) and Convention on unemployment benefits (No. 168), which have respectively set higher standards for the different branches of social security and which enhance migrants' rights.[138]

When migrants live transnationally between their countries of origin and destination, it is important to ensure the "circulation" of their social security, pension and health benefits, so that they are protected in any of the two countries in case specific "risks" occur. All social protection risks can be relevant in the context of circular migration because these types of migrants are at an even greater risk of becoming trapped in a legal vacuum between two countries compared to migrants

135 UN ECOSOC, General Comment No. 14 on the right to the highest attainable standard of health, under the heading "specific legal obligations", the UN Committee on Economic, Social and Cultural Rights, 2000, Para. 34

136 Para. 6 of the Limburg principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986) and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) in Eichenhofer, 'Social security as a human right: A European perspective'.

137 M. C. Ursula Kulke, Karuna Pal, 'Changing Tides: a Revival of a Rights-based Approach to Social Securuty', in J. V. Langendonck (ed.), *The Right to Social Security* (Intersentia, 2007), p. 15.

138 Ibid., p.16.

who have settled in a host country (see Annex V). There is a plethora of international instruments providing for standards in the field of social security coordination, for example, through regulations for export of benefits, equal treatment, maintenance of required rights and those in the course of acquisition, which can be employed here as benchmarks in the assessment of circular migration policies.

According to ILO Convention on Social Equality of Treatment (No. 118),[139] states can choose whether to undertake obligations in respect of any one or more of the following nine branches of social security: medical care, sickness benefit, maternity benefit, invalidity benefit, old-age benefit, survivors' benefit, employment injury benefit, unemployment benefit and family benefit (Article 2). However, Article 5 stipulates that regarding the export of benefits, the contracting state shall guarantee, both its own nationals and the nationals of any other contracting state residing abroad, the provision of invalidity, old-age, survivors' and employment injury pensions. Furthermore, Article 5 is directly applicable and provides for the export of benefits, regardless of the national legislation of the contracting states.[140]

Unlike Convention No. 118, the Maintenance of the Social Security Rights Convention No. 157[141] does not permit the contracting states to pick and choose which branches of social security that the said convention will apply to.[142] According to Article 2 thereof, the convention applies to all general and special social security schemes, both contributory and non-contributory, as well as to schemes consisting of obligations imposed on employers by legislation (employers' liability schemes) in respect of any branch of the nine groups of social security benefits that are covered by the convention.[143]

In addition, the Equality of Treatment (Accident Compensation) Convention No. 19[144] provides for equal treatment in relation to the compensation of nationals of any of the contracting states who have suffered a personal injury due to an industrial accident. Article 1 foresees that this equality of treatment applies without

139 Convention on Social Equality of Treatment (Social Security) Convention, C118, adopted at 46th ILC session on 28 Jun 1962, Geneva, entry into force on 25 April 1964.

140 International Labour Organization, 'Social security coordination for non-EU countries in South and Eastern Europe. A legal analysis', (2012), p. 26

141 Maintenance of the Social Security Rights Convention, C157, adopted at 68th ILC session on 21 June 1982, Geneva, entry into force on 11 September 1986.

142 International Labour Organization, 'Social security coordination for non-EU countries in South and Eastern Europe. A legal analysis', p. 27

143 See Convention No. 118 above for a list of the nine branches.

144 Equality of Treatment (Accident Compensation) Convention, C019, adopted at 7th ILC session on 05 Jun 1925, Geneva, entry into force on 8 September 1926.

any condition in relation to the residence of the migrant worker, meaning that this compensation should be exportable, if this is provided for the nationals of the contracting state.

Furthermore, Article 9 (1) of ILO Migrant Workers Convention (No. 143) prescribes equality of treatment for all migrant workers in respect of rights arising out of previous employment in relation to remuneration, social security and other benefits. This regulation includes the possibility to reimburse social security contributions or the export of benefits to the migrants' country of origin.[145] In addition, Article 27(2) of the ICRMW provides for the possibility to reimburse social security contributions on the basis of the treatment granted to nationals who are in similar circumstances. This in an important standard with regards to circular migrants, especially those who spend very short periods of time in both countries of destination and origin, such as seasonal workers.

Most of the instruments in this field stress the importance of maintaining the acquired rights and rights in course of acquisition under the legislation of contracting states (see Annex V). The model provisions annexed to Maintenance of Social Security Rights Recommendation (No. 167),[146] along with definitions and rules on the applicable legislation, include alternative methods for the maintenance of rights in the course of acquisition through additional periods and the determination of invalidity, old-age and survivor's benefits on the basis of apportionment or method of integration, as well as alternative methods for the determination of benefits in respect of occupational diseases. Furthermore, it suggests different options for the maintenance of acquired rights and the provision of benefits abroad for medical care, sickness benefit, maternity benefit and benefits other than pensions in respect of occupational injuries and diseases, unemployment benefit, family benefit, non-contributory invalidity, old-age and survivors' benefit.

Finally, according to Article 7 (2) of ILO Convention on Social Equality of Treatment these schemes must also provide for the totalisation of insurance periods, employment or residence periods and of assimilated periods for the purposes of the acquisition, maintenance or recovery of rights and for the calculation of benefits, which can be used as another instrument for ensuring that benefits can be exported.

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145 Baruah and Cholewinski, 'Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination', p. 140.

146 Maintenance of Social Security Rights Recommendation, R167, adopted at 69th ILC session on 20 June 1983, Geneva.

3.8.2. Standards developed at the European level

3.8.2.1. Council of Europe standards

The Council of Europe has also adopted standards in the field of social security for its members. The primary instrument is the European Code of Social Security, its annexed Protocol and the Revised European Code of Social Security.[147] They provide minimum standards for the level of social security in all nine branches, which are higher than ILO's Convention on Social Security (Minimum Standards) (No. 102), which was used as a basis for the development of the code.[148] Contracting parties, however, can decide on which parts they will accept and adhere to. The revised code is considered to have raised the minimum standards that were prescribed by its predecessor, as well as being more flexible and promoting a gender neutral approach.[149] Another instrument of the Council of Europe, which provides a general obligation for states to ensure a general right to social security, is the European Social Charter and the (Revised) European Social Charter, which also refers to the ILO's Convention on Social Security (Minimum Standards) (No. 102).[150]

In respect of the coordination of social security, the European Convention on Social Security[151] is one of the CoE instruments that is intended to coordinate the provision of social security.[152] It covers all social security branches, general social security schemes and special schemes, including contributory or non-contribu-

147 The initial Code was adopted in 1964 and entered into force in 1968. The revised version was opened for signature on 6 November 1990.

148 J. Nickless, 'European Code of Social Security. Short Guide', Council of Europe Publishing, (2002), p. 7.

149 Ibid., p. 12.

150 F. Pennings, 'Chapter 2: Historical and Theoretical Background', in U. Becker, F. Pennings, and T. Dijkhoff (eds.), *International Standard-Setting and Innovations in Social Security* (41: Wolters Kluwer Law & Business, 2013a), p. 29. Another important source in the field of social security is the European Convention on Social and Medical Assistance, which obliges its contracting members to treat nationals of other contracting states with legal residence status who are without sufficient resources equally to their own nationals in relation to social and medical assistance. However, it is considered not to be relevant in respect of the scope of this study. For more details, see International Labour Organization, 'Social security coordination for non-EU countries in South and Eastern Europe. A legal analysis', p. 29.

151 European Convention on Social Security, CETS No.078, 14 December 1972 entry into force on 01 March 1977. It was created to replace the existing European Interim Agreement on Social Security Schemes relating to Old-age, Invalidity and Survivors, and the European Interim Agreement on Social Security other than Schemes relating to Old-age, Invalidity and Survivors, which were the first endeavours of the CoE towards multilateral coordination of the national social security systems of its members. For more details see International Labour Organization, 'Social security coordination for non-EU countries in South and Eastern Europe. A legal analysis', p. 28.

152 Nickless, 'European Code of Social Security. Short Guide', p. 15.

tory schemes, as well as employers' liability schemes.[153] The convention contains regulations for the maintenance of acquired rights, rights in the course of acquisition and the payment of benefits abroad for each branch of social security. There are many directly applicable provisions, as well as articles, representing models for the conclusion of bilateral or multilateral agreements between the contracting states implementing them, for instance in relation to the application of special provisions concerning sickness, maternity, unemployment and family benefits, with the exception of the aggregation of periods.[154] These model provisions are complemented with non-legally binding Model Provisions for a Bilateral Social Security Agreement, which are mainly used by Central and Eastern European Members for the drafting of social security agreements.[155]

In addition, Article 73 of the European Code of Social Security stipulates that contracting parties "shall endeavour to conclude" special instruments regulating social security issues for foreigners and migrants, such as equality of treatment with their own nationals, maintenance of acquired rights, as well as rights in the course of acquisition. Moreover, the European Social Charter and Article 12 (4b) of the (Revised) European Social Charter obliges states to conclude bilateral and multilateral agreements in order to ensure "the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties".

The ECHR is another important source of standards that must be considered in the field of social security. Despite the fact that it does not stipulate a right to social security *per se* and it does not contain any social security coordination provisions, the case law of the ECtHR shows that several articles of the ECHR have been used by applicants to challenge national provisions on social security. These include Article 14 of the ECHR - prohibiting discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status -, Article 1 of Protocol No 1 - providing for the protection of property - alone or in

153 Article 2 (2).
154 International Labour Organization, 'Social security coordination for non-EU countries in South and Eastern Europe. A legal analysis', p. 30.
155 Ibid.

conjunction with Article 14[156] - and Article 8 - safeguarding the right to respect for private and family life - in conjunction with Article 14. [157] In addition, there are other provisions of the ECHR that are relevant to social security, such as Articles 3, 6 and 12 but they are considered to fall outside the scope of the current study.

The analysis of the most relevant case law of the ECtHR in this ambit,[158] however, shows that states have a large margin of appreciation in amending social security schemes, withdrawing social security benefits and in making gradual adjustments to their social security schemes. The ECtHR only finds violations in extreme cases, when "the outcome is problematic in an individual case".[159] For instance, when there is deprivation of a whole (almost the whole) pension and the person is not eligible for any other kind of benefit, without granting any transitional period for the person to adjust to the new scheme.

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156 For more details see R. White and C. Ovey, *The European Convention on Human Rights* (Fifth edn.: Oxford University Press, 2010), pp. 483-484; W. A. Schabas, *The European Convention on Human Rights. A Commentary* (Oxford University Press, 2015), p. 958-986. L. Slingenberg, 'Social security in the case law of the European Court of Human Rights', in F. Pennings and G. Vonk (eds.), *Research Handbook on European Social Security Law: Research Handbook on European Social Security Law* (Edward Elgar Publishing, 2015), pp. 54-60. D. J. Harris et al., *Harris, O'Boyle, and Warbrick Law of the European Convention on Human Rights* (Third edn.: Oxford University Press, 2014), pp. 862-872.

157 For more details, see Schabas, *The European Convention on Human Rights. A Commentary,* pp.555-587. S. Livingstone, 'Article 14 and the Prevention of Discrimination in the European Convention on Human Rights', *European Human Rights Law Review,* 1 (1997). O. M. Arnardóttir, 'Vulnerability under Article 14 of the European Convention on Human Rights. Innovation or Business as Usual?', *Oslo Law Review,* 4/3 (2017). S. Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights', *Human Rights Law Review,* 16/2 (2016). See also European Court of Human Rights and European Union Agency for Fundamental Rights, 'Handbook on European law relating to asylum, borders and immigration', Luxembourg: Publications Office of the European Union, (2014).

158 The cases that were analysed include: ECtHR, *Gaygusuz v. Austria*, Judgment of 16 September 1996, Application No. 17371/90; ECtHR, *Stec and others v. the United Kingdom,* Judgment of 12 April 2006, Application Nos. 65731/01 and 65900/01; ECtHR, *Iwaszkiewicz v. Poland,* Judgment of 26 June 2011, Application No. 30614/06; ECtHR, *Koua Poirrez v. France*, Judgment of 30 September 2003, Application No. 40892/98; ECtHR, *Luczak v. Poland,* Judgment of 27 November 2007, Application No. 77782/01; ECtHR, *Andrejeva v. Latvia*, Judgment of 18 February 2009, Application No. 55707/00; ECtHR, *Niedzwiecki v. Germany,* Judgment of 25 October 2005, Application No. 58453/00; ECtHR, *Okpisz v. Germany,* Judgment of 17 June 2003, Application No. 59140/00; ECtHR, *Carson and others v. The United Kingdom,* Judgment of 16 March 2010, Application No 42184/05; ECtHR, *Bah v. The United Kingdom,* Judgment of 27 September 2011, Application No 56328/07; ECtHR, *Efe v. Austria*, Judgment of 08 January 2013, Application No. 9134/06; ECtHR, *Pichkur v. Ukraine,* Judgment of 7 November 2013, Application No. 10441/06.

159 For details, see F. Pennings, 'Non-Discrimination on the Ground of Nationality in Social Security: What are the Consequences of the Accession of the EU to the ECHR?', *Utrecht Law Review,* 9/1 (2013), p.125.

The case law analysis also demonstrates that the distinction based on nationality in the field of social security must be justified by very weighty reasons.[160] This is, however, not the case when it comes to the distinction on the ground of immigration status, where governments are not required to comply with such high standards when excluding foreigners from social security benefits, since the immigration status involves an element of choice.[161] Without underestimating the role of the ECtHR case law in the field of discrimination on grounds of nationality for social security,[162] it is not considered a suitable source for benchmarks in the field of social security coordination for circular migrants who choose to live their lives transnationally between two or more states on the basis of different immigration statuses. Therefore, it is not in line with the premise of voluntarism which is central to this analytical framework.[163]

3.8.2.2. European Union standards

Article 34 of the EU Charter provides an entitlement to social security, drawing on sources such as the ECHR and the aforementioned UN and Council of Europe Treaties.[164] In addition, Article 35 of the EU Charter stipulates the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices.[165]

EU social security coordination rules were adopted on the basis of Article 48 TFEU and its sole aim is the adoption of social security measures to provide and

160 See ECtHR, *Gaygusuz v. Austria*, Judgment of 16 September 1996, Application No. 17371/90, paras 42-50. For a detailed overview, see H. Verschueren, "EC social security co-ordination excluding third-country nationals: still in line with fundamental rights after the Gaygusuz judgment", Common Market Law Review, 34 (1997), pp. 991 – 1017. For further case law analysis, see also Slingenberg, 'Social security in the case law of the European Court of Human Rights', pp.62-64.

161 See ECtHR, *Bah v. The United Kingdom,* Judgment of 27 September 2011, Application No 56328/07, paras 46-47. See also Slingenberg, 'Social security in the case law of the European Court of Human Rights', pp. 64-68.

162 For more details, see L. Slingenberg, 'Social security in the case law of the European Court of Human Rights', in F. Pennings and G. Vonk (eds.), *Research Handbook on European Social Security Law: Research Handbook on European Social Security Law* (Edward Elgar Publishing, 2015). In addition, on export of benefits see ECtHR, *Pichkur v. Ukraine,* Judgment of 7 November 2013, Application No. 10441/06.

163 See the introduction of this Chapter for more details.

164 R. White, 'Article 34 - Social Security and Social Assistance', in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights. A Commentary* (CH Beck/Hart/Nomos Publishing 2014), pp. 930-936.

165 For more details see T. Hervey and J. McHale, 'Article 35 - The Right to Health Care', in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights. A Commentary* (CH Beck/Hart/Nomos Publishing 2014), pp. 951-968.

secure the freedom of movement for workers.[166] The EU social security coordination rules serve as a legal framework for coordination rather than the harmonisation of the national social security systems of the Member States.[167] Regulation (EEC) No. 3 concerning the social security of migrant workers[168] laid the foundations of the modern social security coordination system with essential guiding principles such as the guarantee of equal treatment and the provisions for the export of benefits from one Member State to another.[169] It was repealed by Regulation No. 1408/71[170] with the aim of simplifying and improving the coordination system. The need for further legislative simplification and the increasing CJEU case law, which additionally developed the social security coordination law, led to the adoption of the current Regulation No. 883/2004[171] and later to its Implementing Regulation No. 987/2009.[172]

Article 3 of Regulation No. 883/2004 contains an exhaustive list of the social security branches that it covers: sickness benefits, maternity and the equivalent paternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits, pre-retirement benefits and family benefits. The Regulation also applies to special non-contributory cash benefits covered by Article 70. Its material scope excludes social and medical assistance (Article 3 (5) of Regulation No. 883/2004). Finally, the Regulation's territorial scope does not depend on the place of activity, but rather on the link between the person in question and the Member State's legislation under which the relevant insurance periods were completed.[173] This concerns the EU territory and acts performed outside that territory. Over the years, its personal scope was extended to include, alongside workers, also economically non-active persons, who are nationals of a Member State. Furthermore, Regulation No. 1231/2010 extended Regulation No. 883/2004

166 M. Fuchs and R. Cornelissen, *EU Social Security Law. A Commentary on EU Regulations 883/2004 and 987/2009* (Hart Publishing /Verlag C.H. Beck, 2015), p.11.

167 For more details, see ibid., pp. 34-36.

168 OJ (EEC) No. 561/58 of 16.12.1958. Regulation (EEC) No. 4 contained the procedure for implementing and completing Regulation 3.

169 Fuchs and Cornelissen, *EU Social Security Law. A Commentary on EU Regulations 883/2004 and 987/2009*, p. 6.

170 Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1970] OJ L 149.

171 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166.

172 Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems [2009] OJ L 284.

173 Fuchs and Cornelissen, *EU Social Security Law. A Commentary on EU Regulations 883/2004 and 987/2009*, p.29.

so as to also cover third-country nationals, who have their legal residence in the EU and who are in a cross-border situation.[174]

The basic principles of EU social security coordination law that can be applied as standards for the management of circular migration are very similar to the international standards that are presented in this section and which can be found in Title I and II of Regulation No. 883/2004. These include the determination of the applicable legislation, the equality of treatment, the principle of assimilation (or equal treatment of facts and events), the principle of aggregation of insurance periods and the principle of export of benefits.[175] In *Petroni*, the CJEU derived a principle that an individual cannot be deprived of acquired rights exclusively under national legislation - stating that the aim of Article 45 TFEU and Article 48 TFEU will not be attained if the exercise of free movement rights leads to the loss of advantages in the field of social security that is guaranteed to workers, in any event, by the laws of a single Member State.[176]

The rules determining the applicable legislation (or conflict of law rules), establish the social security legislation of which Member State is applicable in a cross-border situation.[177] These rules are based on the exclusive effect principle, which means that only one law can be applicable at any one time. Article 11 (1) states that persons to whom the Regulation applies shall be subject to the legislation of one Member State only, which aims at preventing anyone from being left without social protection. The general rule is that the place of employment (*lex loci laboris*) is used to determine the applicable legislation for employed persons, subject to exceptions (Article 11 (3) (a)).[178]

In line with Article 18 and Article 45 (2) TFEU, both articles prohibiting discrimination on the basis of nationality, Regulation No. 883/2004 stipulates that persons to whom it applies are entitled to enjoy the same benefits and be subject to the

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174 Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality [2010] OJ L 344.

175 For more details, see F. Pennings, 'Principles of EU Coordination of Social Security', in Frans Pennings and Gijsbert Vonk (eds.), *Research Handbook on European Social Security Law* (Research Handbooks in European Law series: Edward Elgar Publishing 2015), pp. 323-338. Fuchs and Cornelissen, *EU Social Security Law. A Commentary on EU Regulations 883/2004 and 987/2009*, p. 14-18.

176 Case C-24/75 - Petroni v. ONTPS, ECLI:EU:C:1975:129.

177 For more details, see Fuchs and Cornelissen, *EU Social Security Law. A Commentary on EU Regulations 883/2004 and 987/2009*, p. 15.

178 For the exceptions of this rule, see Fuchs and Cornelissen, *EU Social Security Law. A Commentary on EU Regulations 883/2004 and 987/2009*, p. 15.

same obligations under the legislation of any Member State in the same manner as the nationals thereof (Article 4 of Regulation No. 883/2004). This equality of treatment principle is a key rule for social security coordination which, as described in the previous section, can be found in the majority of international social security instruments. It covers both the prohibition of direct and indirect discrimination,[179] but it does not extend to the disadvantages deriving from the divergent social security systems of the Member States.[180] Furthermore, after the *Gottardo* case, [181] when a Member State concludes an international social security agreement or a convention with a third-country covering nationals, it has the obligation to ensure that nationals of other EU Member States are also treated equally in the application of the bilateral agreement with a third country.[182]

The aggregation of insurance periods is one of the main principles in international social security law, often referred to as totalisation in the context of the international law standards on social security that are presented in this chapter. Article 48 (a) TFEU states that in order to facilitate the free movement of workers, social security arrangements must be in place to secure for employed and self-employed migrant workers and their dependants aggregation for the purposes of acquiring and retaining the right to the benefit and for calculating the amount of benefits, of all periods taken into account under the laws of the Member States. This principle currently is embodied in Article 6 of Regulation No. 883/2004.[183] It stipulates a requirement that the competent institution of a Member State should take into account periods of insurance, employment, self-employment or residence that have been completed under the legislation of any other Member State, and to regard them as if they were periods completed under the legislation of that Member State. The aim of this principle is to put the persons who benefited from free movement and thus were subject to more than one social security system in a position as if they had acquired their entire social security record in the system where they claim the respective benefits.[184] The principle of aggregation must be applied even when the current place of residence is a third country.[185] However, this does not necessary mean that a benefit can be exported to a third country nor that aggregation is possible between the EU and a third country.

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179 See Case C-41/84 – Pinna, ECLI:EU:C:1986:1, Para. 23.
180 Pennings, 'Principles of EU Coordination of Social Security', pp. 332-335.
181 See Case C-55/00 - Gottardo v. Istituto nazionale della previdenza sociale, ECLI:EU:C:2002:16.
182 The ways of transposition of *Gottardo-clauses* are laid down in Recommendation No H1 of the Administrative Commission, OJ C279/2013, p. 13.
183 Fuchs and Cornelissen, *EU Social Security Law. A Commentary on EU Regulations 883/2004 and 987/2009*, p. 17.
184 Ibid., p. 17.
185 See Case C-331/06 - Chuck, ECLI:EU:C:2008:188.

The principle of assimilation (or equal treatment of benefits, income, facts or events) was developed through the case law of the CJEU. It is currently provided for in Article 5 of Regulation No. 883/2004 and requires Member States to take into account facts or events occurring in any Member State as though they had taken place on its own territory (Article 5 (b) of Regulation No. 883/2004).[186] As Fuchs and Cornelissen clarify, this principle allows for the expansion of the material scope of the national social security law so as to include facts that took place in other Member States in relation to persons who have exercised their free movement rights, if this is not already provided for under national law.[187] In order to apply this principle, first, the applicable national law (*lex fori)* needs to be determined, which serves as the "rule of decision".[188] Secondly, an evaluative classification must be carried out in order to enable the comparability of foreign facts. With regards to benefits, the CJEU in *Knauer* clarified that the benefits do not have to be identical, but rather they must fulfil the same purpose.[189]

The principle of the export of benefits (or payment of benefits to persons resident in the territories of Member States) is mentioned in Article 48 (b) TFEU, and this constitutes the second coordination method along with the principle of aggregation. This provision makes it possible for a person to receive a benefit in a Member State, in which he/she is not insured or has not contributed to a particular benefit.[190] The export principle is implemented through Article 7 of Regulation No. 883/2004, which provides for the waiving of residence rules. It states that cash benefits shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his family reside in a Member State other than the Member State in which the institution responsible for providing benefits is situated.

Thus the export of benefits is guaranteed for invalidity pensions, old-age and survivors' pensions, pensions in respect of accidents at work and occupational diseases and death grants. Since these benefits are "acquired claims that are paid in cash", the transfer of money between Member States is not problematic.[191] However, this is not the case with benefits in kind, such as medical care, which are impossible to export and therefore require a different coordination approach,

186 Article 5 (a) deals with the assimilation of benefits and income.
187 Fuchs and Cornelissen, *EU Social Security Law. A Commentary on EU Regulations 883/2004 and 987/2009*, p. 120.
188 Ibid., p. 121.
189 C-453/14 - Knauer, ECLI:EU:C:2016:37.
190 Fuchs and Cornelissen, *EU Social Security Law. A Commentary on EU Regulations 883/2004 and 987/2009*, p. 38.
191 Ibid.

namely mutual assistance (Articles 17-20 and Articles 37-38 of Regulation No. 883/2004) and reimbursement between institutions (Article 35 of Regulation No. 883/2004).[192]

It should be noted, that Title III of Regulation No. 883/2004 contains specific rules for each of the benefits covered by this instrument and includes some exceptions from the general principles, for instance concerning export of unemployment benefits under Article 64 of Regulation No. 883/2004.

3.8.3. Standards employed as benchmarks of the analytical framework of this study

EU social security coordination rules and its concomitant principles demonstrate how important social security coordination is for the facilitation of labour mobility. Key principles such as equal treatment and the aggregation of periods are also relevant to circular migration. Without such principles, migrants may find themselves without protection, if a certain risk materialises after they have crossed the border.[193] Furthermore, the principle of the export of benefits also guarantees that EU migrants are not left in a disadvantaged position vis-à-vis their pensions and other benefits as a result of their circulation. These principles are also contained in the international standards that are presented in this section. Therefore they are employed as benchmarks for the analytical framework of this study because they are considered to provide a secure basis for rights-based circular migration.

3.8.4. Instruments for the implementation of the benchmarks

Migrants, especially circular migrants, live an atypical lifestyle, requiring special provisions in relation to various branches of social security.[194] The main existing tools that can provide the flexibly that is needed for circular migrants are bilateral social security agreements.[195] Therefore, most of the international instruments

192 Fuchs and Cornelissen, *EU Social Security Law. A Commentary on EU Regulations 883/2004 and 987/2009*, p. 39.

193 Pennings, 'Principles of EU Coordination of Social Security', p. 325.

194 United Nations General Assembly, 'International Migration and Development', Report of the Secretary-General (2006), p. 68.

195 R. Holzmann, J. Koettl, and T. Chernetsky, 'Portability Regimes of Pension and Health Care Benefits for International Migrants: An Analysis of Issues and Good Practices', Social Protection, Human Development Network, The World Bank prepared for The Global Commission on International Migration, (2005), p. 3.

contain the measures that need to be in place in order to make the "circularity" of benefits take place. The coordination of benefits through provisions for the reimbursement and export of benefits, equal treatment, maintenance of required rights and those in the course of acquisition can be regulated through bilateral measures or through multilateral agreements, and some of the conventions contain model provisions and model agreements in this regard (see Annex V). Despite the fact that they do not cover every issue in relation to social security, they are practical tools for coordination between sending and receiving states.[196]

3.9. Entry and residence conditions for family migrants

3.9.1. Standards developed at the international level

International human rights law does not provide an explicit right to family reunification. Yet, several of the core international human rights law instruments stipulate respect for the right to family or family life against arbitrary or unlawful interference.[197] The right to respect for family life generally includes both a positive obligation for states to protect the family, and a negative obligation to refrain from any unlawful and arbitrary interference with the exercise of the right to family life.[198] Therefore, family reunification is considered to be premised on the right to respect for family life and therefore it constitutes an essential component of international migration law.[199] Among the core human right treaties that safeguard the right to family life are: Articles 12 and 16 of the UDHR, Articles 17 (1) and 23 of the ICCPR, Article 10 (1) of the ICESCR, Article 9 (1) of the CRC, as well as Article 44 (1) of the ICRMW.

An explicit obligation to facilitate family reunion can be found in the CRC, ICRMW, as well as in some of the ILO instruments that protect migrant workers. According to Article 10 (1) of the CRC, "applications by a child or his or her

196 International Labour Organization, 'Social security coordination for non-EU countries in South and Eastern Europe. A legal analysis', p. 37

197 H. Lambert, 'Family Unity in Migration Law: The Evolution of a More Unified Approach in Europe', in V. Chetail and C. Bauloz (eds.), *Research Handbook on International Law and Migration* (Research Handbooks in International Law series Cheltenham, UK: Edward Elgar Publishing 2014), p. 196.

198 V. Chetail, 'The Transnational Movement of Persons under General International Law: Mapping the Customary Law Foundations of International Migration Law', p. 41.

199 Ibid. See also J. Vedsted-Hansen, 'Migration and the Right to Family and Private Life', in M.-C. Caloz-Tschopp and P. Dasen (eds.), *Mondialisation, migration, droits de l'homme : un nouveau paradigme pour la recherche et la citoyenneté* (2: Bruxelles : Bruylant, 2007), p. 722.

parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner". Article 44 (2) of the ICRMW foresees that "[s]tate Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children".

Among the binding and non-legally binding ILO instruments, Article 13 (1) of ILO Migrant Workers Convention (No. 143) requests contracting states "to take all necessary measures which fall within its competence and collaborate with other Members to facilitate the reunification of the families of all migrant workers legally residing on its territory". In addition, the ILO Migrant Worker Recommendation No. 151 contains only one prerequisite for family reunification, which is that "the worker has, for his family, appropriate accommodation which meets the standards normally applicable to nationals of the country of employment".[200] Moreover, ILO members are called upon to allow the family reunion of seasonal migrants and "special purpose workers" who are legally resident in the country,[201] which directly pertains to circular migration.

3.9.2. Standards developed at the European level

3.9.2.1. Council of Europe standards

Among the Council of Europe instruments, Article 19(6) of the (Revised) European Social Charter and Article 12 (1) of the ECMW provides specific measures on family reunification for lawfully resident migrant workers from other contracting parties.[202] For instance, Article 12 (1) of the ECMW stipulates that the waiting period for family reunification shall not exceed 12 months. The European Committee of Social Rights, whose aim is to judge whether State Parties are compliant, in both law and practice, with the provisions of the European Social

200 Migrant Workers Recommendation, 1975 (No. 151), Para. 13(2).
201 See ILO (1997): Guidelines on Special Protective Measures for Migrant Workers in Time-bound Activities (Doc. MEIM/1997/D.4) adopted by the Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration, ILO, Geneva, Annex 1, Para. 6.1.
202 Baruah and Cholewinski, 'Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination', p. 149.

Charter,[203] constitutes a source of further standards with regards to family reunification within the context of circular migration:

- A waiting period of more than one year is not compliant with the ESC;[204]
- Concerning age limitations, family reunification must be possible for children between 18 and 21 years-old;[205]
- A requirement for suitable housing should not be so restrictive so as to prevent family reunification;[206]
- Migrant workers who have a sufficient income to provide for their family members should not be automatically denied the right to family reunification on the basis of the origin of such income, insofar as they are legally entitled to benefits they may receive;[207]
- Pre-departure or in-country integration requirements for family members that must be satisfied in order to be allowed to enter the country or to be granted residence permit constitutes a restriction that is likely to deprive the obligation enshrined in Article 19 (6) of its substance and it is thus not compliant with the provisions of the ESC.[208]

Another important source that safeguards respect for family life is the ECHR. Article 8 (1) ECHR, which is derived from Article 12 of the UDHR, states that "everyone has the right to respect for his private and family life, his home and his correspondence".[209] Therefore, as in the other international human rights instruments, this article contains both a negative and a positive obligation "at the heart of the word 'respect'", denoting according to the case law of the European Court of Human Rights the fundamental principle of rule of law.[210] This means that

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203 State Parties submit annual reports on their implementation of the Charter in law and in practice, on the basis of which the Committee decides whether the countries concerned are in conformity with the Charter. Source: http://www.coe.int/en/web/turin-european-social-charter/national-reports

204 European Committee of Social Rights, Conclusions XVIII-1 - Greece - Article 19-6, document number XVIII 1/def/GRC/19/6/EN, 2006.

205 European Committee of Social Rights, Conclusions XVIII-1 - Greece - Article 19-6, document number XVIII 1/def/GRC/19/6/EN, 2006; Conclusions XVIII-1 - Austria - Article 19-6, document number XVIII-1/def/AUT/19/6/EN, 2006.

206 European Committee of Social Rights, Conclusions 2011 - Belgium - Article 19-6, document number 2011/def/BEL/19/6/EN, 2011.

207 European Court of Human Rights and European Union Agency for Fundamental Rights, 'Handbook on European law relating to asylum, borders and immigration', p. 134.

208 Ibid.

209 Schabas, *The European Convention on Human Rights. A Commentary*, p. 359. Another relevant ECHR Article is Article 12 ECHR, stipulating the right to marry and found a family. However, the ECtHR family reunification case law has typically focused on Article 8 ECHR. Article 12 ECHR has been cited mainly in claims arising from sham marriage controls, e.g., ECtHR, *O'Donoghue v. the United Kingdom*, Judgment of 14 December 2010, Application No. 34808/07.

210 Schabas, *The European Convention on Human Rights. A Commentary*, pp. 367- 368.

the state must refrain from interference with the family and private life, as well as protect individuals from violation of their rights by others. No matter which understanding of Article 8 is applied, a positive or a negative, the Court follows the same principles – striking a fair balance "between the competing interests of the individual and the community as a whole" and leaving the states to enjoy a certain margin of appreciation.[211]

Generally speaking, the ECtHR first assesses whether there has been any interference with the rights provided for in the first paragraph of Article 8 ECHR.[212] Thereafter, it examines the criteria in the second paragraph, stating that any state interference with this right by a public authority should be in accordance with the law and "necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". On the basis of these criteria, the ECtHR decides whether the interference violates the provisions of the ECHR. The phrase, "[i]n accordance to the law" refers generally to the "rule of law" and means, *inter alia*, that the rules should be recognised in the national legal order, that they should be accessible and foreseeable and applied in a manner that is genuine and not arbitrary.[213] The phrase, "[n]ecessary in a democratic society" mainly refers to the proportionality of the measure.

Even though ECHR does not generally stipulate the right of entry for family members *per se*, the case law of the ECtHR provides protection in two distinctive types of cases – when disproportionate restrictions in the context of deportation/expulsion result in a break up of family unity, and in cases of (refusal of) entry for the purposes of family reunification.[214] Thus, Article 8 ECHR may engender a positive obligation for states to facilitate family reunification under certain circumstances, by granting admission or issuing residence permits to family members, if this is deemed to be necessary for the protection of one's family life.[215] For instance, when restrictive family reunification rules prevent individuals from enjoying the right to family life, this can lead to a violation of Article 8 ECHR. Furthermore, states also have a negative obligation under Article 8 ECHR

211 Ibid., p. 368.
212 Schabas, *The European Convention on Human Rights. A Commentary*, p. 367.
213 Ibid, p. 367.
214 Lambert, 'Family Unity in Migration Law: The Evolution of a More Unified Approach in Europe', pp. 204-205.
215 Wiesbrock, *Legal Migration to the European Union*, p. 210.

to abstain from expelling migrants from a country where they live with close family, if this would lead to a breach of the right to family life.[216]

Since this chapter of the study aims to analyse the international standards pertaining to circular migration and the related policy issues at stake, it focused solely on family reunification cases that are related to the refusal to grant visas for spouses and children left behind in the country of origin, with whom the migrant had enjoyed family life abroad, as well as family regularisation cases, whose arguments are applied to family reunification cases.[217]

The review of literature and the most relevant case law of the ECtHR in this ambit[218] in terms of standards which this study can employ in the analysis of the implementation of circular migration policies, shows that states have wide margin of appreciation in family reunification cases which is greater than in expulsion cases[219] and restrictive immigration policies do not typically constitute a violation of Article 8 ECHR because in most of the cases they are considered to pursue legitimate aims and be proportionate to that aim.[220] As Lambert stresses, the ECtHR is more sympathetic to the protection of family rights in the context of expulsion, rather than in relation to refusal of entry in cases of family reunification.[221] In the latter cases, the ECtHR's approach is usually to establish, at an early stage, whether it is reasonable to expect migrants to relocate their family life elsewhere, unless they can prove that there are serious obstacles thereto.[222]

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216 Ibid, p. 211.

217 See European Court of Human Rights and European Union Agency for Fundamental Rights, 'Handbook on European Law Relating to Asylum, Borders and Immigration', p.132.

218 ECtHR, *Gül v. Switzerland,* Judgment of 19 February 1996, Application No. 23218/94; ECtHR, *Abdulaziz, Cabales, and Balkandali v. United Kingdom*, Judgment of 29 May 1985, Application Nos. 9214/80, 9473/81, 9474/81; ECtHR, *Ahmut v the Netherlands*, Judgment of 28 November 1996, Application, No. 21702/93; ECtHR, *Sen v. the Netherlands*, Judgment of 21 December 2001, Application No. 31465/96; ECtHR, *IM v. The Netherlands,* Judgment of 25 March 2008, Application No. 41226/98; ECtHR, *Haydarie and others v. the Netherlands,* Judgment of 20 October 2005, Application No. 8876/04. ECtHR, *Tuquabo Tekle v. The Netherlands,* Judgment of 1 December 2005, Application No. 60665/00; ECtHR, *Osman v. Denmark,* Judgment of 14 June 2011, Application No. 38058/09; ECtHR, *Biao v. Denmark* (Grand Chamber), Judgment of 24 May 2016, Application No. 38590/10.

219 See ECtHR, Gül v. Switzerland, Judgment of 19 February 1996, Application No. 23218/94, Para. 38. Schabas, *The European Convention on Human Rights. A Commentary*, pp. 367- 368. See also Lambert, 'Family Unity in Migration Law: The Evolution of a More Unified Approach in Europe', p. 204 and Wiesbrock, *Legal Migration to the European Union* , p. 211.

220 Wiesbrock, 'Migration and Integration in the Context of Eu Principles of Law and International Law', p. 224.

221 Lambert, 'Family Unity in Migration Law: The Evolution of a More Unified Approach in Europe', p. 204.

222 Lambert, 'Family Unity in Migration Law: The Evolution of a More Unified Approach in Europe', p. 205.

Since 1985 there has been no judgment departing from this 'elsewhere doctrine' established in the case *Abdulaziz, Cabales and Balkandali,* allowing for distinction to be made between groups of nationals who had lasting and strong ties with the country.[223] The 'ties' with the country of origin, which are part of this doctrine, have played a decisive role when weighting the interests of the applicants to enjoy family life and the power of the state to manage migration as part of the ECtHR's proportionality test.[224] The ECtHR left this principle untouched in its latest judgment in this ambit, *Biao v. Denmark*.[225] Therefore, in his concurring opinion to the case, Judge Albuquerqe, stated that "(…) it is high time to depart from the regrettable standard set by *Abdulaziz, Cabales and Balkandali*. This departure concerns the legitimacy of the aims pursued by national legislation in the field of family reunification, and not the proportionality of the legislative measure as applied in a concrete case".[226]

Furthermore, applicants should prove that they cannot enjoy their right to family life elsewhere, including when the case involves children that have been left behind.[227] As the Handbook on European law relating to asylum, borders and immigration acknowledges, the ECtHR's approach in cases involving children left behind "largely depends on the specific circumstances of each particular case".[228] Therefore, these standards cannot provide adequate protection for circular migrants, who are considered to be in a more vulnerable position because they spend their lives between two countries and who are more likely to face such challenges on a regular basis.

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223 S. C. Nuñez, 'The ECtHRs's Judgment in Biao V. Denmark: Non-Discrimination among Nationals and Family Reunification as Converging European Standards. ECtHR, Biao V. Denmark, Judgment of 24 May 2016, Application No. 38590/10', *Maastricht Journal of European and Comparative Law,* 23/5 (2016), p. 883.

224 Ibid, p. 884.

225 ECtHR, *Biao v. Denmark* (Grand Chamber), Judgment of 24 May 2016, Application No. 38590/10. For a detailed analysis of the judgment, see S. C. Nuñez, 'The ECtHRs's Judgment in Biao V. Denmark: Non-Discrimination among Nationals and Family Reunification as Converging European Standards. ECtHR, Biao V. Denmark, Judgment of 24 May 2016, Application No. 38590/10', *Maastricht Journal of European and Comparative Law,* 23/5 (2016).

226 ECtHR, *Biao v. Denmark,* Judgment of 24 May 2016, Application No. 38590/10, concurring opinion of Judge Albuquerqe, Para. 28.

227 See ECtHR, *Gül v. Switzerland,* Judgment of 19 February 1996, Application No. 23218/94. ECtHR, *Ahmut v the Netherlands*, Judgment of 28 November 1996, Application, No. 21702/93; ECtHR, *Sen v. the Netherlands*, Judgment of 21 December 2001, Application No. 31465/96; ECtHR, *IM v. The Netherlands,* Judgment of 25 March 2008, Application No. 41226/98; ECtHR, *Haydarie and others v. the Netherlands,* Judgment of 20 October 2005, Application No. 8876/04. ECtHR, *Tuquabo Tekle v. The Netherlands,* Judgment of 1 December 2005, Application No. 60665/00; ECtHR, *Osman v. Denmark,* Judgment of 14 June 2011, Application No. 38058/09. For analysis of these cases, see Wiesbrock, *Legal Migration to the European Union,* p. 217-224.

228 European Court of Human Rights and European Union Agency for Fundamental Rights, 'Handbook on European law relating to asylum, borders and immigration', p. 133.

3.9.2.2. European Union standards

An important aspect of the right to free movement of workers is that it also covers the right to be joined by family members.[229] Even though it was not part of the wording of the personal market freedoms, the legislator became aware at an early stage that migrants' willingness to move would be enhanced if they were encouraged to do so as a family unit.[230] Therefore, the importance of the protection of the family of nationals of the Member States has been recognised in numerous CJEU judgments[231] and through secondary legislation, namely Directive 2004/38/EC and Regulation No. 492/2011.[232] Furthermore, the right to respect and the protection of the family unit has also been included within the scope of Article 7 of the EU Charter.[233]

According to Article 2 (2) of Directive 2004/38/EC, family members include the spouse of the worker, the partner with whom the Union citizen has contracted a registered partnership, the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner, and the dependent direct relatives in the ascending line and those of the spouse or partner. Adopted children and minors in legal custody are considered dependants in the context of Article 2 (2) of Directive 2004/38/EC.[234]

The entry and exit requirements of family members, who are EU citizens, are the same as for the EU worker (Article 3 of Directive 2004/38/EC). Concerning the family members who are third-country nationals, however, Article 5 (2) of Directive 2004/38/EC requires the possession of an entry visa in accordance with Regulation (EC) No. 539/2001 or national law. In line with the CJEU ruling in *MRAX,*[235] Member States are required to provide to these persons every facility to obtain the necessary visas, to issue the visas free of charge, as soon as possible and on the basis of an accelerated procedure.[236] Moreover, this visa condition is

229 The focus of the study is on entry and residence rights only. Therefore, it does not discuss the rest of the rights for family members under Directive 2004/38/EC.
230 Tryfonidou, '*The impact of Union citizenship on the EU's market freedoms*', p. 101.
231 See for example Case C-127/08 - Metock and Others, ECLI:EU:C:2008:449.
232 Previously by Regulation No. 1612/68, Directive 73/148, 1990 residence Directives.
233 J. Vested-Hansen, 'Article 7 - Respect for Private and Family Life (Private Life, Home and Communications)', in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights. A Commentary* (CH Beck/Hart/Nomos Publishing 2014).
234 Geiger, Khan, and Kotzur, *European Union Treaties. Treaty on European Union. Treaty on the Functioning of the European Union* p. 340.
235 C-459/99 - MRAX v. Belgium, ECLI:EU:C:2002:461.
236 See also Article 5 (4) of Directive 2004/38/EC.

waived in re-entry cases when these third-country nationals possess a valid residence card (referred to in Article 10 of Directive 2004/38/EC).

Family members of EU workers have the right of residence without any further conditions. Furthermore, Article 7 (2) of Directive 2004/38/EC explicitly stipulates the right of residence to family members who are not nationals of a Member State.[237] They have the same right of residence as the EU worker.[238]

Similar to EU workers, their family members who are EU citizens may be required to register in the host Member State, where their planned period of residence is for more than three months. Yet, Article 9 of Directive 2004/38/EC requires the Member States to issue a "Residence card of a family member of a Union citizen" to family members of a Union citizen who are not nationals of a Member State. In the case of spouses who are third-country nationals, absences can lead to the withdrawal of the card. Only temporary absences not exceeding six months a year or absences of a longer duration of a maximum of twelve consecutive months for important reasons do not affect the validity of the card.[239] Family members who are EU citizens can also benefit from the same conditions as the EU worker for the purposes of obtaining the right to permanent residence (Article 16 (1) of Directive 2004/38/EC). In addition, family members who are not nationals of a Member State and who have legally resided with the EU worker in the host Member State for a continuous period of five years are also entitled to this residence status (Article 16 (2) of Directive 2004/38/EC).

3.9.3. Standards employed as benchmarks of the analytical framework of this study and instruments for their implementation

The obligation to facilitate family reunification for all types of economic migrants, including those with a temporary status, can be used as a benchmark for the assessment of circular migration policies in the field of entry and residence conditions for family migrants. It can be achieved through easing the conditions to qualify for family reunification, which is conducive to circular migration, as the family reunification rules for EU citizens and their EU spouses shows. They accommo-

237 The directive codified the principle that was laid down in Case C-370/90 - Singh, ECLI:EU:C:1992:296.
238 See Geiger, Khan, and Kotzur, *European Union Treaties. Treaty on European Union. Treaty on the Functioning of the European Union,* p. 341.
239 Article 11 (2) of Directive 2004/38/EC states that compulsory military service, pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country are considered as important reasons.

date the circular migrant's atypical way of living - with stays in two different countries over different periods of time.

Article 12 (1) of the ECMW, as well as the assessments of the European Committee of Social Rights stress that the waiting period for family reunification should not exceed 12 months.[240] The less burdening the requirements for family reunification are, the more accessible it will be for temporary migrants, who sometimes spend only short periods of time in their country of destination.

The ILO Migrant Worker Recommendation No. 151 is another example of an instrument that facilitates family reunification and which is employed by this study. It contains only one prerequisite for family reunification, which is that "the worker has, for his family, appropriate accommodation which meets the standards normally applicable to nationals of the country of employment".[241] In line with the report of the European Committee of Social Rights, this underlines that a requirement for suitable housing should not be so restrictive as to entirely prevent family reunification.[242]

3.10. Recognition of academic and professional qualifications

3.10.1. Standards developed at the international level concerning recognition of professional qualifications

Among the core international human rights treaties, only the ICRMW contains a provisions concerning the recognition of professional qualifications. Article 52 (2b) of the ICRMW stipulates that states can restrict access to remunerated activity in accordance with their legislation regarding the recognition of occupational qualifications that have been acquired outside their territory. However, they are urged to provide for the recognition of such qualifications.

The ILO instruments provide relatively few legally binding and non-binding regulations in this regard. Article 14 (b) of Convention No. 143 provides that states may "after appropriate consultation with the representative organizations of employers and workers, make regulations concerning recognition of occu-

240 See also ESC report, Greece (2006).
241 Para. 13 (2) of the Migrant Workers Recommendation, 1975 (No. 151).
242 European Committee of Social Rights, European Social Charter (Revised). Conclusions 2011 (Volume 1 Council of Europe Publishing 2012), p. 212-218.

pational qualifications acquired outside its territory, including certificates and diplomas". The same provision is also included in Recommendation No. 151, Paragraph 6. Furthermore, Principle 12 of the ILO's Multilateral Framework on Labour Migration, Guideline 12.6 thereof states that "the recognition and accreditation of migrant workers' skills and qualifications and, where that is not possible, providing a means to have their skills and qualifications recognized".[243]

3.10.2. Standards developed at the European level concerning recognition of professional qualifications

3.10.2.1. Council of Europe standards

The Council of Europe instruments do not contain any standards concerning recognition of professional qualifications. The only relevant provision identified on the basis of a review of the Council of Europe instruments, is stipulated in the European Convention on the Legal Status of Migrant Workers and concerns the obligation to provide information to migrants returning home. Article 30 thereof states that "to enable migrant workers to know, before they set out on their return journey, the conditions on which they will be able to resettle in their State of origin, this State shall communicate to the receiving State, which shall keep available for those who request it, information regarding in particular: (4th bullet) equivalence accorded to occupational qualifications obtained abroad and any tests to be passed to secure their official recognition".

3.10.2.2. European Union standards

As the free movement of persons is one of the fundamental principles of the EU, this covers the right of EU citizens to pursue a profession in a Member State

243 ILO Multilateral Framework on Labour Migration. Non-binding principles and guidelines for a rights-based approach to labour migration, 2006, p. 24; See also Article 14 of ILO Convention No. 143.

other than the one in which they have obtained their professional qualifications.[244] Therefore, Article 53 TFEU (former Article 47 TEC) provides for the adoption of directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications. Several directives have been adopted and amended over the years,[245] which were eventually consolidated in the Professional Qualifications Directive 2005/36/EC providing for the system of recognition of professional qualifications in the EU. The latter was recently amended by Directive 2013/55/EC.

The Professional Qualifications Directive establishes rules for the mutual recognition of professional qualifications regarding regulated professions,[246] for which the access in a host Member State is contingent upon the possession of a specific professional qualification. The effects of the recognition mean, in practice, that beneficiaries gain access, in the host Member State, to the same profession as that for which they are qualified in the home Member State and can pursue it in the host Member State under the same conditions as the nationals of that Member State (Article 4 of the amended Directive 2005/36/EC). The Professional Qualifications Directive provides three systems for the recognition of qualifications for professionals who want to become established in a Member State – a general system for the mutual recognition of qualifications (Chapter I), an automatic recognition system attested by professional experience in some industrial, craft and commercial sectors (Chapter II) and an automatic recognition system for

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244 According to Case C-19/92 - Kraus v. Land Baden-Württemberg, ECLI:EU:C:1993:125, Para. 32, any provision liable to hamper or render the freedom of movement of workers less attractive is an obstacle to this fundamental freedom guaranteed by the Treaty. Restrictions may, however, be justified where they fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it. See Kraus, Para 32 and Case C-55/94 - Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, ECLI:EU:C:1995:411, Para. 37.

245 Council Directives 89/48/EEC and 92/51/EEC, Directive 1999/42/EC of the European Parliament and of the Council on the general system for the recognition of professional qualifications, and Council Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/384/EEC, 85/432/EEC, 85/433/EEC and 93/16/EEC concerning the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor. For a detailed overview, see H. Schneider and S. Claessens, 'The Recognition of Diplomas and the Free Movement of Professionals in the Euroepan Union', in H. Schneider (ed.), (Volume I; Migration, Integration and Citizenship. A Challenge for Europe's Future Forum Maastricht 2005). H. Schneider, 'Die Anerkennung von Diplomen in der Europäischen Gemeinschaft', (Antwerp: Intersentia, 1995).

246 A "regulated profession" is a professional activity, access to which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications, which are qualifications attested by evidence of formal qualifications, an attestation of competence and/or professional experience (Articles 3(1a) and 2 (1b)).

specific professions: doctor,[247] nurse,[248] dentist,[249] vet,[250] midwife,[251] pharmacist[252] and architect[253] (Chapter III).[254] Here automatic recognition is based on minimum training conditions and it lists the titles provided at the national level (see Annex V).

If EU citizens cannot benefit from the specific rules of the two automatic recognition systems because they are unable to satisfy its requirements, the general system for the mutual recognition of qualifications is applied (Article 10 of Directive 2005/36/EC).[255] Article 13 presents the basic rules by distinguishing between two situations. Firstly, access to or pursuit of regulated professions in both the home and host state (Article 13 (1) of Directive 2005/36/EC) and cases where the profession is not regulated in the home state, but it is in the host state (Article 13 (2) of Directive 2005/36/EC).[256] In order to enable the competent authorities to check the applicant's qualification, Article 11 provides for a system with five levels of qualifications, depending on the duration and level of the training to which they correspond. In the first case, the competent authority of the host Member State shall permit applicants to access and pursue a regulated profession, under the same conditions that apply to its nationals, if applicants possess any of the documents demonstrating that they are qualified in the home country. In the second case, the host state must grant access to and pursuit of the profession to applicants who have "pursued the profession referred to in that paragraph on a full- time basis for one year during the previous 10 years in another Member State which does not regulate that profession, providing they possess one or more attestations of competence or documents providing evidence of formal qualifications" (Article 13 (2) of Directive 2005/36/EC).[257]

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247 See Section 2 of Chapter III.
248 See Section 3 of Chapter III.
249 See Section 4 of Chapter III.
250 See Section 5 of Chapter III.
251 See Section 6 of Chapter III.
252 See Section 7 of Chapter III.
253 See Section 8 of Chapter III.
254 Barnard, *The Substantive Law of the EU: The Four Freedoms,* p. 282.
255 On the principle of mutual recognition, see Case C-340/89 - Irène Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg, ECLI:EU:C:1991:193, Para. 19. For more details see L. Kortese, 'Exploring professional recognition in the EU: a legal perspective', *Journal of international Mobility,* 1/4 (2016).
256 For more details, see Barnard, *The Substantive Law of the EU: The Four Freedoms*, p. 282.
257 This criterion was relaxed from two years to one following the modernisation of Directive 2013/55/EU.

In case of significant disparities in both cases,[258] Member States can make the recognition of qualifications subject to compensatory measures that can be applied under the form of "an adaptation period"[259] of up to three years or "an aptitude test"[260] (Article 14 of Directive 2005/36/EC). According to the case law of the CJEU, such compensatory measures must be provided for in the national legislation, in order for Member States to be able to require such measures form the applicants.[261] Furthermore, "compensatory measures, must be restricted to those cases where they are proportionate to the objective pursued. In other words, although those measures are expressly authorised, they may, in certain cases, be a highly dissuasive factor for a national of a Member State exercising his rights under the Directive".[262] The CJEU has also noted the possibility of partially taking-up a regulated profession.[263] The applicant must be able to choose between the two options, subject to possible derogations (Article 14 (2), Paras. 2-3 and (3) of Directive 2005/36/EC). Access to the profession is permitted upon successful completion of either of the two compensatory measures.

Chapter II contains a second approach to mutual recognition that is based on the original sector specific directives.[264] The activities in some industrial, craft and commercial sectors that are covered by the Professional Qualifications Directive and formerly contained in the transitional directives,[265] are subject to automatic recognition of qualifications "attested by professional experience provided that conditions concerning the duration and form of professional experience are satisfied" (Articles 17-18 of Directive 2005/36/EC).[266]

The automatic recognition procedure, provided for in Chapter III, is applicable only to a very limited list of professions.[267] This procedure provides that Member

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258 See Article 14 (1) for more details.

259 The definition of "an adaptation period" in the directive is the pursuit of a regulated profession in the host Member State under the responsibility of a qualified member of that profession, such period of supervised practice possibly being accompanied by further training. This period of supervised practice shall be the subject of an assessment.

260 The definition of "an aptitude test" in the directive is a test of the professional knowledge, skills and competences of the applicant, carried out or recognised by the competent authorities of the host Member State with the aim of assessing the ability of the applicant to pursue a regulated profession in that Member State.

261 C-142/04 - Maria Aslanidou v. Ypourgos Ygeias & Pronoias, ECLI:EU:C:2005:473, Para. 35.

262 C-330/03 - Colegio de Ingenieros de Caminos, Canales y Puertos, ECLI:EU:C:2006:45, Para. 24.

263 Ibid, Para. 25.

264 Barnard, *The Substantive Law of the EU: The Four Freedoms,* p. 284.

265 See Schneider and Claessens, 'The Recognition of Diplomas and the Free Movement of Professionals in the Euroepan Union'.

266 Barnard, *The Substantive Law of the EU: The Four Freedoms,* p. 284.

267 Listed in Annex V, points 5.1.1, 5.1.2, 5.2.2, 5.3.2, 5.3.3, 5.4.2, 5.6.2 and 5.7.1.

States have to recognise evidence of formal qualifications that give access to professional activities in these professions, if EU-wide agreed minimum training conditions are satisfied.[268] If the qualifications match the requirements of the Directive, the Member States should give such evidence the same effect on their territory as the evidence of formal qualifications, which they themselves issue (Article 21 of Directive 2005/36/EC).

The first three systems are applicable to cases where the applicant wants to settle or become established permanently in another Member State. With respect to circular migration, it is important to stress that there is also a more flexible option for work on a temporary and occasional basis for which the formal recognition procedure is not required. The requirement for work on a temporary and occasional basis is provided for in Article 5 is that the applicant must be legally established in a Member State for the purposes of pursuing the same profession there (Article 5 (1) (a) of Directive 2005/36/EC) and when the profession is not regulated in the Member State of establishment, the applicant must have pursued that profession in one or several Member States for at least two years during the last ten years preceding the provision of services. The condition of two years' pursuit is not required if the profession or the education and training leading to the profession is regulated (Article 5 (1) (b) of Directive 2005/36/EC).

Member States may require the applicant to submit a declaration in advance before moving to the competent authority in the host Member State, including the details of any insurance cover or other means of personal or collective protection with regards to professional liability (Article 7 of Directive 2005/36/EC). This declaration is to be renewed every year if the EU citizen plans to continue providing temporary or occasional services in that Member State during the next year. When regulated professions have public health or safety implications, but do not benefit from automatic recognition in accordance with the Directive (Chapter II, III or IIIa of Title III), the competent authority of the host Member State may check the professional qualifications of the service provider prior to the first provision of services. The aim of such a check should be solely to avoid serious damage to the health or safety of the service recipient due to the service provider's lack of professional qualifications (Article 7 (4) of Directive 2005/36/EC). In case of any substantial difference between the professional qualification of the applicant and the required training in the host Member States, the host Member State shall give that service provider the opportunity to show, by means of an aptitude test, that

268 The minimum training conditions are listed respectively in Articles 24, 25, 31, 34, 35, 38, 44 and 46.

they have acquired the knowledge, skills or competences that they were previously lacking.

The EU standards in the field of the recognition of professional qualifications under the Professional Qualifications Directive can also apply to certain third-country nationals on the basis of equal treatment provisions: family members of EU citizens (Directive 2004/38/EC), long-term residents (Directive 2003/109/EC), "Blue card" holders (Directive 2009/50/EC), intra-corporate Transferees (Directive 2014/66/EU), single permit holders (Directive 2011/98/EU), beneficiaries of international protection (Directive 2011/95/EU) and researchers (Researchers' Directive 2005/71/EC and Students' and Researchers' Directive 2016/801/EU). Even though these standards can be applied in order to make circular migration more beneficial, hitherto, they do not necessarily bind all Member States to apply them to third-country nationals. In order to attract highly-skilled migrants and foster skill transfer through the means of circular migration, Member States can apply these standards by expanding their scope to include highly-qualified migrants in general.

3.10.3. Standards employed as benchmarks of the analytical framework of this study and instruments for their implementation

The EU rules on the recognition of professional qualifications provide a possible aspirational model, which can serve as a benchmark in this field in respect of circular migration policies between the EU and third countries. However, it should be kept in mind, that their implementation is not unproblematic.[269] However, in order to further facilitate the recognition process of professional qualifications across borders, international cooperation between the respective institutions in the home and host countries is required, especially in regulated professions. This cooperation can be formalised through the conclusion of bilateral and multilateral agreements for the mutual recognition of academic and professional qualifications.[270] Without international cooperation instruments, which aim at understanding and evaluating the decisions of respective institutions in charge of the recognition of qualifications in other countries, governments need to assess

269 See EMN, Intra-EU Mobility of Third-country Nationals. EMN Synthesis Report (2013), pp. 41-41. See also E. Fries-Tersch, T. Tugran and H. Bradley, 2016 Annual Report on intra EU Labour Mobility, (Second edition, European Commission 2017), p.12.

270 K. Hooper and M. Sumption, 'Reaching a "Fair" Deal on Talent. Emigration, Circulation and Human Capital in Countries of Origin', Washington DC: Migration Policy Institute (2016), pp. 13 -14.

foreign trained candidates on a case-by-case basis.[271] This process can be cumbersome and could create obstacles for the circulating migrants. The international agreements aim to tackle this problem by creating standards, rules and procedures for recognition by reducing or even eliminating the case-by-case assessment.[272]

Another instrument that can support the implementation of this benchmark is the active provision of information to migrants with regards to the equivalence accorded to occupational qualifications that they have obtained abroad and any information on any tests that need to be passed so as to secure their official recognition.

3.10.4. Standards developed at the European level in regards to recognition of academic qualifications

3.10.4.1. Council of Europe

A key legal instrument in the field of academic recognition is the Convention on the Recognition of Qualifications concerning Higher Education in the European Region, referred to as the Lisbon Recognition Convention (LRC).[273] The LRC enables the recognition of qualifications not only among the European states but also across the North American region, Australia and New Zealand. The Explanatory Report to the Convention stresses that the instrument was needed because higher education in Europe had changed dramatically since the adoption of the first conventions, on account of the growing academic mobility and in light of the fact that the old instruments no longer reflected the growing diversity of institutions within the national systems.[274]

Two types of "qualifications concerning higher education" are regulated by the convention - qualifications earned through higher education and qualifications which give access to higher education. This instrument's focus is on the recognition of qualifications, meaning in the terms of the convention "documented

271 ICMPD, 'Prague Process Handbook on Managing Labour and Circular Migration', pp. 44 and 52.
272 M. Sumption, D. G. Papademetriou, and S. Flamm, 'Skilled immigrants in the global economy. Prospects for international co-operation on recognition of foreign qualifications', Migration Policy Institute (2013), p. 4.
273 Convention on the Recognition of Qualifications concerning Higher Education in the European Region, CETS No.165, adopted 11 April 1997, entry in force 1 February 1999.
274 See also Council of Europe, 'Explanatory Report to the Convention on the Recognition of Qualifications concerning Higher Education in the European Region', European Treaty Series - No. 165, Lisbon, (1997), pp. 1-2.

competence, knowledge and skills without recourse to repetition of assessment, examination and testing of such competence, knowledge and skills".[275] In addition, the term "recognition" means a formal acknowledgement by a competent authority of the value of a foreign educational qualification with a view to accessing educational and/or employment activities (e.g., doctoral studies or the exercise of gainful employment).[276]

3.10.5. Standards employed as benchmarks of the analytical framework of this study and instruments for their implementation

The convention stipulates the basic principles that can be used as benchmarks in the field of the academic recognition of qualifications. According to Article III.1 of the LRC, holders of qualifications that have been issued in one country shall have adequate access to an assessment of these qualifications in another country. Furthermore, the responsibility to demonstrate that an application does not fulfil the relevant requirements lies with the body that is undertaking the assessment (Article III.3 (2) of the LRC).

According to the LRC, each party is required to generally recognise qualifications in relation to access to higher education, periods of study within the framework of another higher education programme or higher education degrees that are similar to the corresponding qualifications in its own system, unless it can show that there are substantial differences between domestic qualifications and the qualifications for which recognition is sought.[277] The "substantial differences" are measured in terms of the learning outcomes, which are becoming the proxy for quality when assessing foreign qualifications, and not through names of courses, length of studies or obligatory reading lists.[278]

The establishment of national information centres, offering advice on the recognition of foreign qualifications to parties or persons, are among the instruments that support the implementation of the recognition of academic qualifications (Article IX.2 of the LRC). In order to implement the LRC, and in order to develop

275 P. Zgaga, 'The Lisbon Recognition Convention as a paradigmatic shift and a change of the philosophy of recognition: between reflection and sentiments', in S. Bergan and C. Blomqvist (eds.), *The Lisbon Recognition Convention at 15: making fair recognition a reality* (Council of Europe, 2014), pp. 21-23.

276 Section 1, p. 4 of the Convention.

277 Section 4, 5 and 6.

278 Council of Europe, 'Explanatory Report to the Convention on the Recognition of Qualifications concerning Higher Education in the European Region', p. 9.

policy and practice for the recognition of qualifications, the Council of Europe and UNESCO have established the European Network of National Information Centres on academic recognition and mobility (ENIC Network). In addition, all countries shall encourage their higher education institutions to issue the UNESCO/Council of Europe Diploma Supplement to their students in order to facilitate recognition (Article IX.3 of the LRC). Finally, the Bologna process also provides instruments that support the recognition of academic qualifications (see Annex V).

3.11. Conclusion to Chapter 3

This Chapter focused on the ways to regulate and facilitate rights-based circular migration. It mapped the standards developed at the international and at the European level that can be applied to circular migration, as well as the lessons that have been learned and the good practices derived from the application of past and present time-bound labour migration policies. To summarise, if policy makers want to establish circular migration policies that are beneficial for migrant workers, they need to design them in such a way that accommodates the transnational links of migrants with both the countries of origin and destination, as well the possibility for migrants to determine their own trajectory.[279] These are also the premises of the proposed benchmark framework. Flexible entry and re-entry conditions, for instance, on the basis of multi-entry visas or visa free regimes, as well as permits that allow the accumulation of residence periods for permanent status, and long absences from the country of destination, would make migrants feel more secure and thus more prone to circulation. Keeping restrictions to change of employer and sector to a minimum and allowing migrants to transfer from one job to another during the duration of their work permit is another policy measure that would make circulation beneficial for migrants.

Furthermore, fostering the "circulation of benefits" on the basis of agreements for social security coordination which reflect the international instruments' standards presented in this section would provide protection for migrant workers, if a certain risk occurs after crossing the respective border. In addition, easing conditions to qualify for family reunification, so that temporary migrants can also access them, would differentiate the new generation of circular migration schemes from the

279 K. Newland and D. Agunias, 'How can Circular Migration and Sustainable Return Serve as Development Tools?' (Background paper for Roundtable 1.4, GFMD Brussels 2007), p. 11 and Newland, 'Circular Migration and Human Development', p. 1.

old guest-worker schemes. Last but not least, further facilitation of the procedures for the recognition of professional qualifications through international cooperation instruments and an active information policy in relation to the recognition of academic qualifications would make circular migration beneficial for the circular migrant and would in turn support the skill and knowledge transfer.

The identified standards as benchmarks and policy elements lie at the core of this study's analytical framework and they are employed as aspirational targets for the sake of assessing the implementation of circular migration policies at both the European and national level.

CHAPTER 4:

The development of the circular migration approach at the international and at the European level

4.1. Introduction

This chapter presents the development of the circular migration approach at both the international and at the European level respectively. Firstly, it reviews the policy documents that have been published by international organisations that advocate this type of migration, such as publications from the United Nations, the World Bank, the International Organisation for Migration (IOM) and the Global Commission on International Migration (GCIM). This is done in order to provide an understanding of the term as a policy concept. Secondly, it examines the genesis of circular migration in the EU's immigration policy by analysing the main policy developments and the legal acts that have been adopted since the Tampere programme, as well by analysing the concluded interviews with EU and international actors that have had a bearing on the topic. Finally, it examines the concept in the context of the Eastern Partnership and the GAMM. This is done through a review of different legal and policy instruments that can be found under the auspices of GAMM, such as Mobility Partnerships, visa facilitation agreements and dialogues, and their implementation on the basis of interviews that were conducted with different stakeholders between 2013 and 2017.

4.2. The circular migration approach in the agenda of international organisations in the context of the migration – development nexus

As was demonstrated in Chapter 2, there is a long history of policy attempts that have tried to manage temporary and circular migration, which did not necessarily end with the curtailment of guest-workers programmes after the *Oil crisis* that took place at the beginning of the 1970s. The 1990s were marked by a shift in international migration that was related to an increase in circular and non-perma-

nent programmes that were enacted on a global scale.[1] These types of patterns were facilitated as a result of improvements in communications and accessible transportation that was in turn brought about by the process of globalisation. They were further encouraged by policy initiatives at the national, regional and international level respectively. Many member states of the OECD introduced policies that were designed to encourage flexibility in the labour market, which in turn aimed to facilitate multiple, multi-directional and circular movements between countries.[2] Traditional immigration countries such as Australia, Canada and the US, where immigration is considered to be an integral part of the nation-building process, consequently established temporary and non-immigrant programmes in order to compete for skills and labour in the globalising world.[3] Temporary or seasonal migrant worker programmes were also introduced in a number of European countries such as for example in Germany, the Netherlands, Ireland and Norway.[4]

Why did policy-makers renew their interest in this temporary approach to migration? Castles has identified several reasons for this phenomenon: the recognised demand for migrant workers of different skill levels due to demographic and economic factors and the inability of border control authorities to prevent migration, which in turn led to undocumented migration and the concomitant security concerns that arose as a result of this type of migration.[5] Another reason, that was stressed by Castles and argued by Ruhs and Vertovec, attributed this renewed interest to the gradual recognition by policy-makers of the influence that transnational links have on migration processes.[6] The value of worldwide remittances as a global economic resource, as well as the role of migrant transnational ties for development, drove national institutions, international organisations and intergovernmental forums to create policies that were designed to maximise the potential of the migration–development nexus.[7] The concept of circular migra-

1 G. Hugo, 'Circular Migration: Keeping Development Rolling?', (2003).
2 K. Newland, 'Circular Migration and Human Development', UNDP Human Development Reports, 42, (2009b), p. 6.
3 R. Skeldon, 'Global Migration: Demographic Aspects and Its Relevance for Development', United Nations, Department of Economic and Social Affairs, Population Division, Technical Paper No. 2013/6 (2013), p. 3.
4 S. Castles, 'Back to the Future? Can Europe meet its Labour Needs through Temporary Migration?', *International Migration Institute Working Papers, University of Oxford,* Paper 1 (2006), p. 1.
5 Ibid., p. 10.
6 S. Vertovec, 'Circular Migration: The Way Forward in Global Policy?', *International Migration Institute Working Papers,* Paper 4 (2007), p. 2. See also M. Ruhs, 'The potential of temporary migration programmes in future international migration policy. A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration', (2005).
7 Vertovec, 'Circular Migration: The Way Forward in Global Policy?', p. 2.

tion was made popular as a result of this "policy rage" that was visible at the global level.[8] Different international organisations endorsed it on the basis of their own interpretations and they started to promote multilateral solutions for its facilitation, even before providing their own definition. This "seductive term" entered the policy debate to become one of the top ten migration issues in 2008.[9]

The GCIM, appointed by the former Secretary General of the United Nations, Kofi Annan, in December 2003, was among one of the first international actors to promote the concept of circular migration at the international level.[10] As Wickramasekara has stressed, the Commission's report did not propose any definition of circular migration and it used the term alongside the terms temporary migration and return migration.[11] The GCIM underlined that "(…) countries in the developing world stand to make more gains from the temporary and circular migration of their citizens than from their permanent departure".[12] But instead of focusing on both types of migration, it suggested certain key issues that needed to be taken into consideration only with regards to the establishment of temporary migration schemes: informing temporary migrants about their rights and conditions of employment prior to their departure from their country of origin; ensuring that migrants are treated in the same way as nationals with respect to their wages, working hours, health care and other entitlements; giving temporary migrants the right to transfer from one job to another during the period of their work permit, etc.[13]

Even though the Global Commission did not provide a definition, it expressed strong views in support of facilitating circular migration. It made an assessment that "the old paradigm of permanent migrant settlement is progressively giving way to temporary and circular migration".[14] As Vertovec has underlined,[15] in order to capitalise on this shift, the GCIM recommended boosting circularity: "States and international organisations should formulate policies and programmes that

8 R. Skeldon, 'Going Round in Circles: Circular Migration, Poverty Alleviation and Marginality', *International Migration,* 50/3 (2012), p. 43.
9 Ibid.
10 See GCIM, 'Migration in an Interconnected World: New Directions for Action. Report of the Global Commission on International Migration', (2005).
11 P. Wickramasekara, 'Circular Migration: A Triple Win or a Dead End', Discussion Paper No 15, The Global Union Research Network, (2011), p. 58.
12 GCIM, 'Migration in an Interconnected World: New Directions for Action. Report of the Global Commission on International Migration', p. 17.
13 Ibid., pp. 17-18.
14 Ibid., p. 31.
15 Vertovec, 'Circular Migration: The Way Forward in Global Policy?', p. 3.

maximize the developmental impact of return and circular migration".[16] However, it remained unclear what the basis for this positive assessment was, since the only example that was provided by the Global Commission was the temporary migration pattern of Asian workers, working under short-term employment contracts, both within and outside of the region.[17]

This positive assessment could be attributed to Martin Ruhs's paper that was prepared for the GCIM, even though he did not explicitly mention or provide any definition of what constitutes circular migration. He argued that "innovative policy designs of temporary migration programmes could help avoid the past policy mistakes and generate significant benefits for all sides involved, including migrant workers and their countries of origin".[18] Ruhs proposed a number of policies that needed to be adopted in order to implement the new generation of circular migration schemes including, *inter alia*, the strict enforcement of immigration and employment laws, implementation of effective labour market tests, protection of migrants' rights by making work permits portable within certain sectors/occupations after a certain period of time and mixed incentives-enforcement measures for return.[19] However, he stressed that any programme of this kind would also require "some trade-off between the economic gains (…) and restrictions of some of the individual rights of migrants while employed abroad".[20]

The IOM also used the concept of circular migration in its "2005 World Migration" report without, however, providing a definition thereof, arguing that it could benefit development and contribute towards the alleviation of poverty.[21] The IOM recommended that migrant receiving countries should provide more avenues for regular, repeat temporary labour migration and offer incentives to migrants by offering future return to the same job.[22] It advocated making residence or dual citizenship available to certain migrants and that establishing more flexible visa

16 GCIM, 'Migration in an Interconnected World: New Directions for Action. Report of the Global Commission on International Migration', p. 80. See Recommendation No. 11.
17 Wickramasekara, 'Circular Migration: A Triple Win or a Dead End', p. 58.
18 Ruhs, 'The potential of temporary migration programmes in future international migration policy. A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration', p. 1.
19 Ibid., p. 22.
20 Ibid., p. 14. On that aspect, see also M. Ruhs, *The Price of Rights: Regulating International Labor Migration* (Princeton University Press, 2013).
21 IOM, 'World Migration. Costs and Benefits of International Migration', World Migration Report Series, 3, Geneve, (2005), p. 296.
22 Ibid.

regimes would act as an incentive to productive and free exchange between countries.[23]

In 2006, the World Bank's Europe and Central Asia Region section published a report on international labour migration in Eastern Europe and the former Soviet Union.[24] It suggested that in those countries where public support for the permanent migration of unskilled migrant was low, they would be more comfortable with the concept of circular migration.[25] The report advocated the benefits that the adoption of managed circular migration might have in facilitating the development and the fostering of cross-border opportunities for trade and investment, as well as the benefits of encouraging the international transfer of skills and thus reducing any potential 'brain drain'. According to the report, circular migration allegedly was also being able to prevent any of the negative social consequences that are associated with family separation due to long-term migration and irregular migration.[26] On the basis of a conducted survey among migrants, it also suggested that "the shift to a circular pattern of labor migration is likely a closer match with the preferences of many migrants to spend short periods abroad—building human and financial capital—and then return home".[27]

The UN Secretary-General's Report to the United Nations' High-level Dialogue on International Migration and Development in 2006 focused mainly on temporary migration programmes, outlining their potential and the problems associated with their implementation in the past.[28] There was, however, no mention of the term circular migration. Instead, the term "circulation" was used coupled with the notion of "return migration".[29] "Circulation" was defined as encompassing migrants that were settled abroad who return for a period and then leave again, excluding return for short visits only.[30] One of the merits of the report was that it made a case for the security of residence statuses abroad as a prerequisite for

23 Ibid.
24 World Bank, 'Migration and remittances. Eastern Europe and the former Soviet Union', Europe and Central Asia Region (2007).
25 Ibid., p. 13.
26 Ibid.
27 Ibid., p. 98.
28 U.N. Secretary-General, International Migration and Development. Report of the Secretary-General, delivered to the General Assembly, Sixtieth session, Agenda item 54 (c), Globalization and interdependence: international migration and development, U.N. Doc. A/60/871 (2006).
29 U.N. Secretary-General, International Migration and Development. Report of the Secretary-General, delivered to the General Assembly, Sixtieth session, Agenda item 54 (c), Globalization and interdependence: international migration and development, U.N. Doc. A/60/871, p. 16.
30 U.N. Secretary-General, International Migration and Development. Report of the Secretary-General, delivered to the General Assembly, Sixtieth session, Agenda item 54 (c), Globalization and interdependence: international migration and development, U.N. Doc. A/60/871, p. 68.

successful circulation: "Beneficial circulation between the home and host countries seems more likely when migrants have security of status. Enforced circulation related to the renewal of temporary residence or work permits may lead to fewer benefits".[31]

Circular migration also emerged as a "(…) new theme that goes to the heart of the work of the Global Forum on Migration and Development".[32] The background paper for the GFMD's session on circular migration in 2007 finally provided a working definition of the concept of circular migration as follows: "Circular Migration is the fluid movement of people between countries, including temporary or more permanent movement which, when it occurs voluntarily and is linked to the labour needs of countries of origin and destination, can be beneficial to all involved".[33] The session recognised that circular migration encompasses both aspiring migrants whom wish to temporarily work abroad, and more permanent, established migrants, returning their skills and know-how to their country of origin, either temporarily or permanently, while concurrently retaining a right of residency abroad.[34]

One of the Global Forum on Migration and Development panels drew parallels between the historic guest-worker schemes and the proposed circular migration schemes. Accordingly, it stressed that circular migration "(…) may guarantee greater temporariness and legality of migration, while flexibly meeting the labour needs of employers in destination countries" and that policy-makers needed to overcome their scepticism about the historic guest-worker models.[35] Some best practices were identified for the purposes of serving as a future basis for the operationalisation of new circular migration schemes. Among them were the United

31 U.N. Secretary-General, International Migration and Development. Report of the Secretary-General, delivered to the General Assembly, Sixtieth session, Agenda item 54 (c), Globalization and interdependence: international migration and development, U.N. Doc. A/60/871,p. 44.

32 GFMD, 'Report of the first meeting of the Global Forum on Migration and Development, Belgium, July 9-11, 2007', (2007), p. 76. The GFMD was set up with the aim of building on the work of the High-level Dialogue on International Migration and Development that was held at the UN General Assembly in September 2006, as well as the work of the GCIM.

33 K. Newland and D. Agunias, 'How can Circular Migration and Sustainable Return Serve as Development Tools?', Background paper for Roundtable 1.4, GFMD, Brussels (2007).

34 GFMD, 'Report of the first meeting of the Global Forum on Migration and Development, Belgium, July 9-11, 2007', p. 76.

35 Ibid.

Nations Development Programme's TOKTEN,[36] IOM's MIDA Great Lakes programmes,[37] the dual citizenship policies in some countries and multiple entry visas to facilitate circularity, as well as seasonal agricultural workers agreements. [38] The panel also proposed a model for testing circular migration in Mauritius.[39]

An important question that was raised by the Global Forum was how the circular migration approach squared with the current labour market and the immigration priorities of destination countries. One of the approaches proposed was to make circular migration more acceptable among migration policy makers by promoting it from a development angle rather than a labour market planning angle, and to pilot it as a training-work programme.[40] In its final report, the GFMD recommended that:

> "Circular migration should be tested concretely as a mutually beneficial policy arrangement between origin and destination countries. More information is needed about the effectiveness of current schemes, with a view to improving them; and the broad working definition should be more detailed to facilitate future evaluations. Pilot projects should be attempted, with proper monitoring in order to assess their effectiveness and relevance".[41]

The Global Forum also proposed follow-up actions on circular migration as part of their preparations for the Forum's next meeting (Manila, 2008): a workshop on circular migration was co-organised by Mauritius and the European Commission,

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36 TOKTEN is an acronym for the Transfer of Knowledge Through Expatriate Nationals. The United Nations Development Programme (UNDP) introduced TOKTEN in Turkey in 1977 in order to help reduce the adverse effects of the "Brain-Drain" phenomena or "reverse transfer of technology" in many developing countries. TOKTEN offers a window of opportunity for expatriate nationals with vast experience in their respective fields of specialisation to return to their home countries for an agreed period of time and on voluntarily basis. More information is available at: http://www.sd.undp.org/content/sudan/en/home/operations/projects/democratic_governance/dg_tokten.html (accessed 17 November 2017).

37 MIDA stands for Migration and Development for Africa. MIDA seeks to respond to the 'brain drain' phenomenon in African countries through the creation and strengthening of sustainable links between diasporas and countries of origin. The objective is to encourage the transfer of competencies and resources of the African Diaspora benefiting countries of origin and strengthening the capacity of local public and private institutions. More information can be found at: http://belgium.iom.int/index.php/fr-FR/projects/mida-great-lakes

38 GFMD, 'Report of the first meeting of the Global Forum on Migration and Development, Belgium, July 9-11, 2007', p. 78.

39 For more details, see GFMD, Mauritius' Circular Migration Case, retrieved at: https://www.gfmd.org/pfp/ppd/16 (accessed 17 November 2017).

40 GFMD, 'Report of the first meeting of the Global Forum on Migration and Development, Belgium, July 9-11, 2007', p. 78.

41 Ibid., p. 8.

scheduled for September 2008 and an independent assessment of the development impacts of skills circulation models, such as MIDA and TOKTEN to assess the "feasibility of scaling them up and/or expanding them for greater development impact in the country of origin".

The commencement of the global financial and economic crisis in 2008 marked a general decrease in the interest of international organisations in this concept. Nevertheless, it has been consistently placed on the agenda of the GFMD since its inception in 2007.[42] It was also covered by a 2016 report that was conducted by the Task Force on Measuring Circular Migration that was set up by the Bureau of the Conference of European Statisticians[43] and the New York Declaration for Refugees and Migrants that was adopted by the General Assembly on 19 September 2016.[44] However, as one of the interviewees stressed, it has not been actively used in the global discourse over the past few years.[45] She added: "If it was such a big development or a migration policy tool, why didn't it end up in the sustainable development targets?".[46]

This section has demonstrated that the implementation of circular migration initiatives has been promoted by international organisations primarily as means to maximise the benefits for both sending and receiving countries. The most used argument in favour of circular migration is the allegedly positive effects that it could have on preventing a brain drain in the sending countries.[47] On the other hand, for receiving countries, these initiatives would constitute a convenient way of filling labour shortages.

As was demonstrated in Chapters 1 and 2, this section has also revealed that a number of policies need to be enacted in order to successfully establish circular migration policies. [48] According to Newland, since the Global Forum in 2007,

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42 See the reports of the proceedings from each forum at the following link: https://gfmd.org.

43 Conference of European Statisticians and United Nations Economic Commission for Europe, 'Defining and Measuring Circular Migration. Final report of the Task Force on Measuring Circular Migration, U.N doc ECE/CES/BUR/2016/FEB/14/Add.1, 20 January 2016', (2016).

44 U.N. General Assembly, Resolution adopted by the General Assembly on 19 September 2016, 71/1. New York Declaration for Refugees and Migrants, Seventy-first session, Agenda items 13 and 117, U.N. Doc. A/RES/71/1.

45 Interview #28 with representative of international organisation, Austria, March 2017, Annex I.

46 Interview #28 with representative of international organisation, Austria, March 2017, Annex I.

47 H. Schneider and A. Wiesbrock, 'Circular migration: A triple win situation? Wishful thinking or a serious option for suitable migration policy?', in D. Schiek, U. Liebert, and H. Schneider (eds.), *European Economic and Social Constitutionalism after the Treaty of Lisbon* (Cambridge University Press, 2011), p. 133.

48 Ibid.

two branches of policy debate on circular migration have been formed. The first one views circular migration as a generally spontaneous long-standing pattern of mobility, which can be encouraged or discouraged by policy measures. [49] The second branch recognises circular migration as a policy tool for migration management and to a certain extent for development cooperation, which is facilitated through formal, bilateral or multilateral programmes and projects.[50] The next section investigates which one of these approaches has been pursued at the EU level.

4.3. The development of the circular migration approach at the European level

4.3.1. The genesis of circular migration in EU's migration policy

The 2001 Proposal for a Council Directive on Admission for Paid Employment and Self-employed activities[51]

The development of the EU's approach to circular migration can be traced back to the entry into force of the Treaty of Amsterdam, when the EU was endowed with competences in the field of migration under Title IV "Visas, asylum, immigration and other policies related to free movement of persons". The newly inserted Title IV gave the EU the competence to adopt measures in the ambit of internal and external border controls; short-term visas; asylum; immigration policy, covering conditions of entry and residence, family reunion, measures concerning the rights and conditions under which legally-residing third-country nationals may reside in other Member States, as well as competence in the field of irregular migration and repatriation.[52]

This provided a legal basis for the EU to start adopting secondary legislation in all of these respective fields and to work towards the development of an Area of Justice, Freedom and Security within the EU, as well as securing a more robust

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49 K. Newland, 'The Paradox of Permanency: An Incentive-based Approach to Circular Migration Policy in the European Union', *Swedish Presidency Conference paper "Labour Migration and its Development Potential in the Age of Mobility" 15-16 October 2009, Malmo Sweden, Round Table Theme 2: Circular migration* (2009), p. 18.

50 Ibid.

51 Proposal for a Council Directive on the conditions for entry and residence of third country nationals for the purpose of paid employment and self-employed economic activities, COM (2001) 386 final, 11.7.2011.

52 Articles 61-63 EC. For more details, see K. Hailbronner, *Immigration and Asylum Law and Policy of the European Union* (Kluwer Law International, 2000), pp. 35-122.

role for the Commission, not just in proposing policy and legislation but also in negotiating agreements with third countries.[53] The first multi-annual programme for the development of EU's Justice and Home Affairs policies was adopted by the European Council in Tampere on 15-16 October 1999. Covering a five-year period, the Tampere programme set out the political guidelines for the establishment, *inter alia*, of a common EU migration and asylum policy.[54]

Making use of its competences that were granted to it by the Treaty of Amsterdam to legislate on the immigration of third-country nationals, four instruments pertaining to the admission of third-country nationals were gradually proposed by the Commission between 1999 and 2002 – on the right to family reunification, the rights of status of long-term residents, on admission for paid employment and self-employment and finally on the admission conditions for the purposes of studies, vocational training or voluntary service.[55] In 2004, in order to complement the proposal for the Students' Directive, the Commission also presented a proposal on the admission and mobility of researchers. Despite the "ambitious" agenda on legal migration that followed from the Tampere European Council, however, it took three and a half years of difficult negotiations before the EU Long-term Residence Directive was finally adopted, which was then followed by the adoption of the Students' and Researchers' Directives respectively.[56]

Yet, due to the limitations of the institutional settings under Title IV of the Treaty of Amsterdam and the strong resistance that was exhibited by the Member States, the negotiations behind the proposal that focused on the admission for paid employment and self-employment were frozen, and they were subsequently withdrawn.[57] This Commission proposal, however, should be briefly reviewed because it illustrates the EU's first attempt to legislate on the possibility for circular migration through "secure legal status for temporary workers who intend to return to

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53 S. Lavenex and R. Stucky, 'Partnering for migration in EU external relations', in R. Kunz, S. Lavenex, and M. Panizzon (eds.), *Multilayered Migration Governance: The Promise of a Partnership* (Routledge, 2011), p. 118.

54 The rest of the policy domains are a genuine European area of justice; a union-wide fight against crime and stronger external action. These issues will not be discussed here because they fall outside the focus of this dissertation. Tampere Presidency Conclusions, 15-16 October 1999, SN 200/99. For more details on the implementation of the Tampere Presidency Conclusions, see A. Wiesbrock, *Legal Migration to the European Union* (Brill/Nijhoff, 2010).

55 G. Papagianni, *Institutional and Policy Dynamics of EU Migration Law* (Martinus Nijhoff Publishers 2006), pp. 157-158.

56 Ibid., p. 159. These directives are discussed in greater detail in Chapter 5.

57 European Commission, Communication from the Commission to the Council and the European Parliament - Outcome of the screening of legislative proposals pending before the Legislator, COM/2005/0462 final, Brussels, 27 September 2005.

their countries of origin, while at the same time providing a pathway leading eventually to a permanent status for those who wish to stay and who meet certain criteria".[58] Furthermore, it provided provisions in the policy areas that needed to be addressed with regard to circular migration.

As Papagianni notes, the proposal was based on two main categories of principles: the establishment of a transparent, flexible and clear mechanism to recruit workers both quickly and successfully, and at the same time to respect the domestic labour market needs of the Member States.[59] Article 11 of the Commission proposal listed the rights conferred on economic migrants including, *inter alia*, the right to entry and re-entry after a temporary absence from the territory of the Member State that issued the permit.[60] The Commission stressed in its Explanatory Memorandum that "this proposed Directive shall ensure that migrants are not cut off from their country of origin and that they have possibilities of going back as the situation develops in the country of origin".[61]

Article 11 (3) of the proposal also legislated for the right to request and obtain the payment of the contributions that were made by economic migrants and by their employers into public pension schemes during the period of validity of their permits under certain conditions. According to the Explanatory Memorandum, this process would have been discouraged, "(…) if third-country nationals were too "lose" the payments they made into public pension schemes in a Member State upon return to a third country". Therefore, this provision served as "supplementary protection addressing those cases in which the concerned third-country national has neither acquired a right to an EU pension to be paid now or in the future in a third country, nor a possibility to transfer his/her EU pension rights into a scheme of the third country where he/she resides".[62]

What should also be mentioned in this discussion is that the proposal envisaged that economic migrants should enjoy "the same treatment in substance as citizens of the Union" at least with regards to certain basic rights, such as working

58 Interview # 30 with European Commission official, Belgium, November 2017, Annex I. European Commission, Communication on a Community immigration policy, COM (2000) 757 final, Brussels, 22 November 2000, p. 17. Also included in the Explanatory Memorandum in European Commission, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM (2001) 386, 27.11.2001.

59 Papagianni, *Institutional and Policy Dynamics of EU Migration Law,* p. 170.

60 Article 11 (1) (a) and (b) of the Proposal.

61 Article 11 (3) of the Explanatory Memorandum.

62 Article 11 (3) of the Explanatory Memorandum.

conditions, access to vocational training, recognition of diplomas and social security including healthcare.[63] According to the Explanatory Memorandum, this was aligned with the catalogue of rights that were present in the Commission's proposal for an EU Long-term Residence Directive, but it was also designed in line with the principle that the rights of third-country nationals should be incremental with their length of stay. In addition, Article 10 (3) stipulated that unemployment *per se* was not to constitute a sufficient reason for revoking the permit, unless the period of unemployment exceeded a specified period of time. Nevertheless, economic migrants were restricted to the exercise of specific professional activities or fields of activities for an initial period of three years.[64]

The Commission proposal provided for specific rules in relation to certain categories of migrants, such as seasonal workers, intra-corporate transferees and trainees. The failure of this proposal gradually led to the establishment of the sectorial approach to labour migration addressing different categories of migrants at the EU level, and eventually to the adoption of the Single Permit Directive, which are subsequently discussed in this Chapter.

The notion of partnership with countries of origin

The development of the EU circular migration approach is also intertwined with the notion of partnership with countries of origin.[65] The Tampere European Council meeting identified partnerships with countries of origin as being one of the essential elements of a future comprehensive approach to migration, with the potential to address political, human rights and development issues in third countries.[66] Additionally, more efficient management of migration flows was highlighted as another integral part of the future common EU migration and asylum policy.[67] The Council underlined that there should be efforts to conclude readmission agreements with third countries, as well as the promotion of voluntary return - these were regarded as key elements in this development. Legal migration was one of the aspects that was acknowledged by the European Council, stressing the need for closer cooperation of national laws on the conditions for the admission and residence of third-country nationals.[68] Partnerships with countries of origin and readmission agreements were identified once again as being among the essential

63 Article 11 (1) of the Explanatory Memorandum.
64 Article 8 of the Proposal.
65 S. Carrera and R. Hernández i Sagrera, 'The Externalisation of the EU's Labour immigration policy. Towards mobility or insecurity partnerships?', CEPS Working document no. 321, (2009), p. 4.
66 Tampere Presidency Conclusions of 15 and 16 October 1999, paras. 10-12.
67 Ibid., paras. 22-27.
68 European Council, Tampere Presidency Conclusions of 15 and 16 October 1999, para. 20.

policy measures in the Council's report on "European Union priorities and policy objectives for external relations in the field of justice and home affairs".[69]

The Communication of the Commission on a Community immigration policy that was issued one year later presented the idea of creating legal migration channels to the EU for third-country nationals.[70] As Lavenex noted, however, "the comprehensive partnership approach reached its rhetorical peak at Tampere" and in the following years this gave way to the notion of partnership with a one-sided focus on migration control and readmission. [71]

The Laeken Presidency Conclusions from December 2001 reconfirmed the need for migration policy integration in the European Union's foreign policy, particularly through the conclusion of readmission agreements with third countries.[72] The conclusions from the Seville European Council took this one step further by placing a special emphasis on the link between the EU's relations with third countries and combating "illegal migration".[73] The European Council underlined that "(…) any future cooperation, association or equivalent agreement which the European Union or the European Community concluded with any country should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration".[74] As Carrera and Hernandez I Sagrera stress, the Spanish presidency marked the beginning of a "securitarian approach to human mobility" in the development of the external dimension of the EU's immigration policy.[75] However, that trend actually commenced in 1985 following the initiation of Schengen cooperation, when the set of rules that were being adopted were primarily aimed at preventing the entry of undesired migrants.[76] The prevalence of measures targeting visas, irregular migrants, border control and expulsion continued after 1999.

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69 Council of the European Union, "A" Item Note from COREPER to the General Affairs Council/ European Council, document number: 7653/00 LIMITE JAI 35 on "European Union priorities and policy objectives for external relations in the field of justice and home affairs" of 6 June 2000; see also previous draft, document number 7512/00 LIMIITE JAI 33 of 24 May 2000.

70 European Commission, Communication on a Community immigration policy, COM (2000) 757 final, Brussels, 22 November 2000, p. 17.

71 Lavenex and Stucky, 'Partnering for migration in EU external relations', p. 119.

72 European Council, Laeken Presidency Conclusions, 15 and 16 December 2001, SN 300/1/01 REV 1, p. 11, para. 40.

73 European Council, Seville Presidency Conclusions, 21-11 June 2002, 13463/02, p. 8-9, para. 33 – 36.

74 European Council, Seville Presidency Conclusions, 21-11 June 2002, 13463/02, p. 8, para. 33.

75 Carrera and Hernández i Sagrera, 'The Externalisation of the EU's Labour immigration policy. Towards mobility or insecurity partnerships?', p. 5.

76 K. Gronendijk, 'Introduction: Migration and Law in Europe', in E. Guild and P. Minderhoud (eds.), *The First Decade of EU Migration and Asylum Law* (Brill/Nijhoff, 2012), p. 12.

In December 2002, the European Commission published a Communication entitled "Integrating migration issues in the European Union's relation with third countries".[77] This was the Commission's answer to the request from the Heads of States and Governments to apply a targeted approach and to integrate immigration policy into the Union's relations with third countries, by using all of the appropriate EU external relations instruments. One of the purposes of the Communication was to "put the migration issue back in its broader context" within the political dialogue part of the Association and Co-operation Agreements negotiated and signed between the EU and third countries.[78] The Commission exhibited a shift in its approach by stressing that the focus of the dialogues with third countries would be broadened to address not only readmission and irregular migration, but also to address the legal migration channels. More specifically, the agreements would also include: measures targeting the root causes of migration; legal migration management, including ways of regulating the demand and supply of low skilled labour through temporary working permits; the integration of legal migrants; as well as the facilitation of "brain circulation" for legally residing migrants in the EU whom wished to contribute to the development of their countries of origin.[79]

In line with the securitarian approach that was promulgated by the Seville European Council, the Commission proposed in its Communication that Article 13 of the Cotonou Agreement between the EU and African, Caribbean and Pacific Group of States (ACP states) should serve as a flexible model for migration clauses that are to be negotiated in future agreements with other third countries.[80] Article 13 of the Cotonou Agreement contains provisions pertaining to cooperation on migration issues, including, *inter alia*, ensuring respect for human rights and the elimination of all forms of discrimination, fair treatment and integration of legally residing third- country nationals.[81]

However, Article 13 also provides for the combatting and prevention of irregular migration, as well as a standard readmission clause, which contains a commitment for each of the ACP States to "accept the return and readmission of any of its nationals who are illegally present in the territory of a Member State of the Euro-

77 European Commission, Communication on integrating migration issues in the European Union's relations with third countries, COM (2002) 703 final, Brussels, 3 December 2002, p. 4.

78 Ibid., p. 23.

79 Ibid., p. 23.

80 Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 [2000] OJ L 317.

81 For more details, see E. Koeb and H. Hohmeister, 'The revision of Article 13 on Migration of the Cotonou Partnership Agreement. What's at stake for the ACP?', (2010).

pean Union, at that Member State's request and without further formalities".[82] Article 13 also includes a commitment to negotiating readmission agreements, if this is requested by one of the parties. All of this showed that even though the Commission advocated for "a broader context", its rationale actually remained security-driven. This was also evident from the way that the European Commission justified the shift in its approach, which is reproduced as follows:

> "Experience so far has taught that the time needed to negotiate a readmission agreement, which is seen as being in the sole interest of the Community, should not be underestimated and no quick results should be expected. They can only succeed if they are part of a broader co-operation agenda, which takes duly into account the problems encountered by partner countries to effectively address migration issues. This is the reason why the Commission considers that the issue of "leverage" – i.e. providing incentives to obtain the co-operation of third countries in the negotiation and conclusion of readmission agreements with the European Community – should be envisaged on a country by country basis, in the context of the global policy, cooperation and programming dialogues with the third countries concerned".[83]

Part 11 "Readmission agreements" of the Communication "Integrating migration issues in the European Union's relation with third countries" revealed that all measures, except the ones in the fields of readmission and irregular migration, were outside "the sole interest of the Community" and were used as "leverage" in order to ensure cooperation with third countries.[84] The ultimate goal of the partnership with third countries was to negotiate and sign readmission agreements. Therefore, the Commission also envisaged the possibility of ensuring accompanying support in the form of technical and financial assistance for the better management of migration flows,[85] as well as compensatory measures such as a

82 Ibid., p. 25.
83 Ibid., p. 25.
84 In European Commission, Communication on integrating migration issues in the European Union's relations with third countries, COM (2002) 703 final, Brussels, 3 December 2002.
85 After Tampere, the European Commission has started to provide support to third countries through programmes that are specifically dedicated to border management, the fight against irregular migration and migration management. These include, for example, MEDA for the Mediterranean region, CARDS for the Western Balkans, TACIS in Eastern Europe and Central Asia, etc. In European Commission, Communication on integrating migration issues in the European Union's relations with third countries, COM (2002) 703 final, Brussels, 3 December 2002, p. 18.

more generous visa policy in respect of cooperating countries or increased quotas for migrant workers.[86]

Even though the Communication did not explicitly mention the term circular migration, it addressed the brain drain phenomenon and the need to facilitate brain circulation within the EU in Part 4.2 of the Communication which was entitled "Brain circulation". The Commission stressed the "win-win scenarios" for the migrant, the sending and the receiving states that were possible when migrants maintained links with their country of origin and returned voluntarily either on a permanent or temporary basis.[87]

On the basis of the Communication "Integrating migration issues in the European Union's relation with third countries", the Council adopted conclusions on migration and development, acknowledging the "development of a real partnership with third countries" in the "broader context" set by the Commission as a key element of a future successful migration policy in May 2003.[88] The Council formulated five key principles for action on migration and development, covering, *inter alia*, the Union's objectives to tackle the root causes of irregular migration, to combat the smuggling and trafficking of human beings, to improve the control and management of migration flows and to address the root causes of migration as part of a comprehensive approach for dialogue and action with third countries.[89] The Commission was invited to advance the migration agenda within the context of current and future Association, Cooperation or equivalent Agreements, as well as to continue to invest in efforts for the conclusion of readmission agreements for compulsory readmission in the event of irregular migration.[90] The European Commission was also requested to formulate ways to regulate "demand and supply and organising access of labour, e.g. through temporary residence - work permits" and to facilitate the brain circulation of highly-skilled migrants.[91]

Five years after the adoption of the Tampere programme in 1999, the European Council approved a second multi-annual programme on the Union's policy priorities in the Area of Justice and Home Affairs for the 2005-2009 period. The Hague

86 European Commission, Communication on integrating migration issues in the European Union's relations with third countries, COM (2002) 703 final, Brussels, 3 December 2002, p. 18.
87 European Commission, Communication on integrating migration issues in the European Union's relations with third countries, COM (2002) 703 final, Brussels, 3 December 2002, p. 16.
88 Council of the European Union, Council Conclusions on migration and development, 8927/03, Brussels, 5 May 2003, p. 4.
89 Ibid., p. 5.
90 Ibid., p. 9.
91 Ibid., p. 8.

Programme once again re-emphasised the importance of partnership with third countries.[92] In light of the terrorist attacks in the United States on 11 September 2001 and in Madrid on 11 March 2004, and the strengthened securitarian approach, the European Council demanded the establishment of a removal and repatriation policy that was based on common standards.[93]

This section has demonstrated that the circular migration concept emerged in the EU's policy agenda as a tool for the prevention of "brain drain", and thus it became part of the migration-development nexus policy debate that was part of the global discourse. Initially adopted as one of the instruments of the external dimension of the EU's migration policy, it was soon coupled with the tools that were needed for the fight against irregular migration, border control and readmission and it gradually became an integral part of EU's securitarian approach towards migration. Eventually, these two parallel policy tracks merged, thereby forming security "channels" for migration.

4.3.2. Introduction of the circular migration approach in the EU's migration policy

The European Commission introduced the term circular migration into European policy-making circles through its Communication on Migration and Development in 2005.[94] One Commission official, who was involved in this process, shared that a number of academics and business sector representatives proposed to the Commission that they should utilise this concept.[95] The main motivation behind engaging with this concept was the fact that the labour market was changing – there were more temporary jobs requiring very specific skills and different means of production – and thus the argument was that the traditional understanding of migration leading to settlement as a main goal were not capable of capturing these new realities.[96] Additional reasons for introducing this concept were to counteract the "brain drain" from third countries' health sectors and also because circular migration was seen as means of allowing "skills to move back and forth".[97] Another official having the institutional memory of the introduction of this concept shared

92 European Council, The Hague Programme: strengthening freedom, security and justice in the European Union, OJ C 53/1, 3 March 2005, p. 11.
93 Ibid., p. 13.
94 European Commission, Communication on Migration and Development: Some concrete orientations, COM (2005) 390 final, Brussels, 1 September 2005.
95 Interview #29 with European Commission official, Brussels, May 2017, Annex I.
96 Interview #29 with European Commission official, Brussels, May 2017, Annex I.
97 Interview #29 with European Commission official, Brussels, May 2017, Annex I.

with the author that the Commission picked on the "famous triple-win idea" and used it to make a case for legal migration in general and to "(…) make it easier for the Member States to step in (…)".[98] In addition, the idea was also to use circular migration under the General Agreement on Trade in Services (GATS).[99] Yet, the Directorate-General for Economic and Financial Affairs was not open to accepting this new concept. Therefore, it had to make its way by being included in the different Communications that were related to development and migration.[100]

The Commission defined it as "(…) migration, in which migrants tend to go back and forth between the source country and the destination country (...)".[101] The term was used as an umbrella term for return and temporary migration, which according to the European Commission had the potential to maximise the benefits of migration on development of the countries of origin, mitigating the impact of brain drain and to foster brain circulation. The Commission's working definition was rather broad, covering low-skilled seasonal and temporary migrants, as well as highly-skilled migrants (e.g., researchers), residing both in the country of origin and in the host country (e.g., diaspora members). One interviewee who witnessed the introduction of this concept said: "(…) the interpretation of the Spanish was: we talk about seasonal workers, for whom there are instruments and which is nothing new, which could be better organized and Europeanized (...). The Swedish interpretation sometimes went so far by saying: if the kids of migrants go back, we should also see that as circular migration. We talked from something ultra-short, people going back after three months, to something that is interpreted extremely wide: everyone with migrant roots keeping a relationship with their country of origin going back".[102]

In its Communication, the European Commission also underlined the obstacles and prerequisites that had to be in place in order to unleash the potential of this type of migration for the purposes of development. In order to encourage migrants to engage in circular migration and to travel back and forth between their country of origin and their country of destination, the Commission stressed the need to grant returnees a multi-entry visa allowing them to return to their former country

98 Interview #9 with European Commission official, Belgium, March 2013, Annex I.
99 Interview #29 with European Commission official, Brussels, May 2017, Annex I.
100 Interview #29 with European Commission official, Brussels, May 2017, Annex I.
101 European Commission, Communication on Migration and Development: Some concrete orientations, COM (2005) 390 final, Brussels, 1 September 2005, Annex 5, p. 25.
102 Interview #22 with representative of international organisation, Austria, March 2017, Annex I.

of residence, as well as maintaining the validity of the returning migrants' residence permits after return to their countries of origin.[103]

Furthermore, according to the Communication, Member States could encourage circular migration "(…) by giving a priority for further temporary employment to workers who have already worked under such schemes and have returned at the end of their contract".[104] It could also be facilitated by "rewarding" participating migrants by reimbursing their pension contributions at the end of their contracts. In addition to financial incentives, the public authorities in the Member States could offer possibilities for secondments to institutions in developing countries for migrants or diaspora members whom wish to engage in such activities, as well as removing the legal obstacles to unpaid sabbatical leaves and encouraging businesses to enable their foreign employees to take unpaid leave for engaging in such activities.

Another possible EU measure for facilitating circular migration that was envisaged in the Communication was the establishment of a general framework for the entry and short-term stay of seasonal migrants,[105] as well as the facilitation of issuing conditions for uniform short stay visas for researchers from third countries travelling within the EU for the purposes of carrying out their scientific research.[106] The Commission also presented the possibility of proposing measures regarding the transferability of pension rights and social security schemes benefits, the recognition of qualifications or mechanisms to facilitate voluntary returns and the successful reintegration of researchers or other professionals who have worked in the EU.

One interviewee stressed that these were references to the rights under EU law that circular migrants should benefit from.[107] It was also clear that this required the establishment of certain "regimes". Yet, the Commission wanted to first see whether the Member States were willing to engage with these types of policies

103 European Commission, Communication on Migration and Development: Some concrete orientations, COM (2005) 390 final, Brussels, 1 September 2005, Annex 5, p. 27.
104 European Commission, Communication on Migration and Development: Some concrete orientations, COM (2005) 390 final, Brussels, 1 September 2005, Annex 5, p. 26.
105 On the basis of the Green Paper of 11 January 2005 on an EU approach to managing economic migration, COM (2004) 811 final, Brussels, 11 January 2005.
106 The Commission already proposed in March 2004 a Recommendation concerning the facilitation of issuing conditions for uniform short stay visas for researchers from third countries travelling within the EU for the purpose of carrying out scientific research.
107 Interview #29 with European Commission official, Belgium, May 2017, Annex I.

and then subsequently focus on the rights dimension.[108] One interviewed representative of an international organisation underlined that many of the rights-related questions were not solved at the European level, namely because of the lack of a completely harmonised interpretation.[109]

A broad interest in circular migration and its benefits was taken one step further in the Policy Plan on Legal Migration[110] that was presented by the European Commission in 2005 and this was done by proposing specific policy instruments.[111] The Policy plan was elaborated on the basis of the Green Paper on the EU's approach to managing economic migration[112] and the analysis of the received contributions. Its purpose was to serve as a road-map for the remaining period of the Hague Programme (2006-2009), listing the actions and legislative initiatives that would lead to the coherent development of an EU legal migration policy.[113] The Commission envisaged a general framework directive that would regulate the rights of all third-country nationals in legal employment that were already present in a Member State, but who had not yet obtained an EU long-term residence status, as well as the following four specific instruments:

1. a Proposal for a directive on the conditions of entry and residence of highly-skilled workers;
2. a Proposal for a directive on the conditions of entry and residence of seasonal workers;
3. a Proposal for a directive on the procedures regulating the entry into, the temporary stay and residence of Intra-Corporate Transferees (ICT) and
4. a Proposal for a directive on the conditions of entry and residence of remunerated trainees.

The proposed instruments did not make any explicit reference to circular migration. However, in a separate section called "Cooperation with countries of origin", the Commission proposed feasibility studies for separate measures to support circular and return migration, and stressed that arrangements on managed temporary

108 Interview #29 with European Commission official, Belgium, May 2017, Annex I.
109 Interview #22 with representative of international organisation, Austria, March 2017, Annex I.
110 European Commission, Communication on Policy Plan on Legal Migration, COM (2005) 669 final, Brussels, 21 December 2005.
111 Vertovec, 'Circular Migration: The Way Forward in Global Policy?', p. 4.
112 European Commission, Green Paper of 11 January 2005 on an EU approach to managing economic migration, COM (2004) 811 final, Brussels, 11 January 2005.
113 European Commission, Communication on Policy Plan on Legal Migration, COM (2005) 669 final, Brussels, 21 December 2005, p. 3.

and circular migration would be included in some of the specific instruments.[114] Among the envisaged possible measures that aimed to facilitate circular migration were the provisions for long-term multi-entry visas for returning migrants; a possibility for former migrants to be given priority for obtaining new residence permits for further temporary employment under a simplified procedure and the creation of an EU database of third-country nationals who left the EU upon the expiration of their temporary residence or work permit.

Moreover, the Communication referred to the EU Long-term Residence Directive as a good example that offered "interesting possibilities" regarding circular and return migration. According to the Commission, the directive offered a possibility for Member States to allow returning migrants to retain this status for longer than the one-year period that was provided for in Article 9 thereof. Therefore the Roadmap for the proposed measures in the Policy Plan envisaged an analysis of the transposition and implementation of Article 9 of the directive, which was due to be implemented in 2007.[115] Among the other Roadmap activities, there were also feasibility studies carried out in relation to long-term multi-entry visas and on the effective implementation of circular migration; financial support under EU financial instruments for pilot projects for the creation of training structures in the countries of origin (from 2006), and based on preceding studies and feasibility analysis, the possible presentation of proposals to concretely support circular and return migration (2009).

4.3.3. Circular migration as part of the Global Approach to Migration and Mobility (GAMM)

The deaths of hundreds of African migrants in 2005 who were trying to enter the Spanish enclaves of Ceuta and Melilla in North Africa, triggered a new impetus for a policy response in relation to cooperation with third countries at the EU level.[116] At an informal meeting in Hampton Court in October 2005, the EU Heads of State and Government agreed on a comprehensive approach to tackle migration.[117] The Council further stressed the importance of creating partnerships with

114 European Commission, Communication on Policy Plan on Legal Migration, COM (2005) 669 final, Brussels, 21 December 2005, p.11.
115 European Commission, Communication on Policy Plan on Legal Migration, COM (2005) 669 final, Brussels, 21 December 2005, p.13.
116 K. Eisele, *The External Dimension of the EU's Migration Policy. Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective* (Brill | Nijhoff, 2014), p. 90.
117 Ibid.

third countries and the benefits of a "comprehensive and balanced approach" to tackle migration.[118] The Council concluded that such an approach would "enhance the benefits of migration for both third countries and the EU, as well as migrants themselves, whilst ensuring co-ordinated action against illegal migration, trafficking in human beings and people smuggling".[119] The already existing agreements with third countries – the Cotonou Agreement, the Stabilisation and Association Agreements, the Neighbourhood Action Plans and the Euro-Mediterranean Association Agreements, as well as the dialogue within the Barcelona Process – were identified as the basis of this future comprehensive approach.[120]

In a follow-up Communication, the Commission also recognised the need for a coherent and overall approach to migration issues, and it committed itself to focusing on all aspects of migration and intensifying financial assistance within its existing institutional framework, covering the areas of Development, External Relations, European Neighbourhood Policy, Freedom, Security and Justice and Employment.[121] Acknowledging that migration was a global phenomenon, it proposed priority actions that were targeted at increasing operational coordination between the Member States and strengthening the dialogue with neighbouring countries and countries of origin, with a specific focus on the Mediterranean region and African countries.

The European Council officially adopted this approach in December 2005, which started to be referred to as the "Global Approach to Migration" (GAM).[122] According to the Council Conclusions, the new approach consisted of policy measures that were designed to combat irregular immigration, ensure safe return, strengthen durable solutions for refugees and to build the capacity for better managed migration, including "through maximising the benefits to all partners

118 Council of the European Union, Council Conclusions on Migration and External Relations, doc. Number 14769/05 of 21 November 2005, pp. 4-7.

119 Ibid.

120 Ibid.

121 European Commission, Communication on Priority actions for responding to the challenges of migration - First follow-up to Hampton Court, COM (2005) 621, Brussels, 30 November 2005, p.2.

122 European Council, Brussels Presidency Conclusions of 15 and 16 December 2005, SN 15914/01/05, 30.12.2005, Annex 1: "Global Approach to Migration: Priority Actions focusing on Africa and Mediterranean".

of legal migration".[123] However, beyond that statement, it did not envisage any concrete labour migration measures and thus there was no mention of circular migration.[124]

Circular migration based on EU partnerships with third countries became an attractive policy tool within the Franco-German initiative for a "New European Migration Policy" that was initiated in 2006.[125] This approach was identified by Nicolas Sarkozy and Wolfgang Schäuble as strategy that would reduce and control irregular migration on the basis of quotas for temporary labour migration into certain occupations, and it would be accompanied by measures for readmission in cases where migrants do not want to return voluntarily.[126] Therefore, the Commission was invited to continue to negotiate readmission agreements, with a view to securing quotas and permits for temporary workers. Moreover, in order to address the need for enhanced cooperation with third countries, the European Commission also had to present to the Council a plan for developing partnerships between the Member States and main countries of origin on the basis of a "European treaty".

By the end of 2006, the European Commission reported on the first year of the implementation of the Global Approach, which at this stage only focused on Africa and the Mediterranean region.[127] The Commission proposed the inclusion of two new policy areas in the GAM that were not covered in 2005 - legal migration and integration measures - in order to make "the European Union's approach truly comprehensive".[128] It acknowledged that legal migration had to form part of both

123 European Council, Brussels Presidency Conclusions of 15 and 16 December 2005, SN 15914/01/05, 30.12.2005, Annex 1: "Global Approach to Migration: Priority Actions focusing on Africa and Mediterranean", para. 3. On the basis of a GAM evaluation, in 2011 the European Commission in its Communication from 18.11.2011 promulgated a renewed Global Approach to Migration and Mobility (GAMM), which aimed to make it "more strategic and more efficient, with stronger links and alignment between relevant EU policy areas and between the external and internal dimensions of those policies".

124 Carrera and Hernández i Sagrera, 'The Externalisation of the EU's Labour immigration policy. Towards mobility or insecurity partnerships?', p. 11.

125 S. Angenendt, 'Circular Migration: A Sustainable Concept for Migration Policy?', SWP Comments 11, Stiftung Wissenschaft and Politik, Berlin, (2007), p. 1.

126 "New European Migration Policy", a plan presented by Nicolas Sarkozy and Wolfgang Schäuble to G6 immigration ministers meeting in the UK, 26 October 2006, p.4 .

127 The geographical focus of this dissertation is on the CEE and Eastern Partnership countries; therefore the GAM's provision on cooperation with African countries of origin will not be presented here.

128 European Commission, Communication on the Global Approach to Migration one year on: Towards a comprehensive European migration policy, COM (2006), 735, Brussels, 30 November 2006, p.2.

the external and internal EU policies and it consequently proposed two concrete policy measures: the creation of migration centres and mobility packages.[129]

The aim of the migration centres was to provide information on employment opportunities within the EU and to facilitate different skill development, which would increase the chances of third-country nationals finding legal employment in Europe. The Commission proposed the establishment of these centres in partnering third countries with EU funding and claimed that they could also contribute to facilitating the management of seasonal workers, as well as the exchange of students and researchers.[130]

The Communication linked circular migration to the newly introduced Mobility Packages. In order to facilitate circular migration as a migration management tool, the Commission envisaged the adoption of measures relating to administrative capacity building in third countries.[131] The boosted administrative capacity would enable third countries to meet "certain conditions" with regards to cooperation on irregular migration and to establish effective mechanisms for readmission, which would allow them to start negotiations for Mobility Packages with the EU. The aim of the Mobility Packages was to serve as a framework for managing legal migration that was based on the "possibilities offered by the Member States and the European Community, while fully respecting the division of competences as provided by the Treaty".[132] The Commission also stressed that in the context of this framework, the conclusion of readmission agreements, strengthening cooperation on irregular immigration and border management could be prerequisites for visa facilitation with the partnering third countries.

In December 2006, following the proposals of the Commission, the European Council[133] identified circular migration as one of the guiding principles in the development of the EU's policy on legal migration.[134] The Commission was invited to present proposals on legal migration, focusing on the development of a balanced partnership with third countries and on the ways and means of facili-

129 European Commission, Communication on the Global Approach to Migration one year on: Towards a comprehensive European migration policy, COM (2006), 735, Brussels, 30 November 2006, p.7.
130 European Commission, Communication on the Global Approach to Migration one year on: Towards a comprehensive European migration policy, COM (2006), 735, Brussels, 30 November 2006, p.7.
131 Ibid.
132 Ibid.
133 European Council, Presidency Conclusions of 14/15 December 2006, point 24, lett. a, p. 9.
134 H. Schneider and A. Wiesbrock, 'Circular Migration and Mobility Partnerships, Briefing paper, Directorate-General for Internal Policies, European Parliament', (2009), p. 4.

tating circular and temporary migration by June 2007.[135] The European Council also decided to extend the geographical focus of the GAM to cover the neighbouring Eastern and South-Eastern regions.

4.3.4. An EU twofold approach towards facilitation of circular migration

In response to this invitation of the European Council, the Commission published a Communication in May 2007 that focused entirely on circular migration and Mobility Partnerships between the European Union and third countries. [136] The Commission used the working definition of circular migration that it adopted earlier in its Communication on Migration and Development from 2005. The Communication further elaborated upon the working definition by outlining two main forms of circular migration that are relevant in the EU context: temporary engagement of third-country nationals settled in the EU with business, professional or voluntary activities in their countries of origin, and temporary opportunities for entry and re-entry for persons residing in a third country for the purposes of work, study and/or training in the EU. As Wiesbrock and Schneider underline,[137] the Communication made it clear that the type of circular migration that the EU wished to facilitate was essentially temporary migration: "if not properly designed and managed, migration intended to be circular can easily become permanent and, thus, defeat its objective".[138]

The Commission envisaged two approaches for facilitating circular migration – on the basis of a legislative framework that promoted circular migration, and through the development of circular migration schemes, enabling migrants to temporarily perform certain activities in the EU. In the Commission's view, both approaches had to be accompanied with the necessary conditions and safeguards, ensuring that this kind of migration would remain circular.[139] The legislative harmonisation of the already existing instruments and the introduction of special measures in future legislative acts, announced in the Policy Plan on Legal Migration, were

135 European Council, Presidency Conclusions of 14/15 December 2006, point 24, lett. a, p. 9.
136 European Commission, Communication on circular migration and mobility partnerships between the European Union and third countries, COM (2007) 248 final, Brussels, 16 May 2007.
137 Schneider and Wiesbrock, 'Circular Migration and Mobility Partnerships, Briefing paper, Directorate-General for Internal Policies, European Parliament', p. 5.
138 European Commission, Communication on circular migration and mobility partnerships between the European Union and third countries, COM (2007) 248 final, Brussels, 16 May 2007, p.8.
139 European Commission, Communication on circular migration and mobility partnerships between the European Union and third countries, COM (2007) 248 final, 16 May 2007, p.8.

identified as ways to put in place a framework that would be conducive to circular migration.

The directives that the Commission considered adjusting for the sake of fostering circularity, included the EU Long-term Residence Directive,[140] the Students' Directive[141] and the Researchers' Directive.[142] The Policy Plan on Legal Migration already identified the EU Long-term Residence Directive as an instrument that offered "interesting possibilities" in relation to circular migration, and it was envisaged to carry out an analysis of the transposition and implementation of Article 9 thereof. The Communication reconfirmed the Commission's intention to extend the permitted period of absence from the territory of the EU from twelve consecutive months to two or three years, after which the long-term status could be withdrawn. A similar measure was also envisaged in relation to the Students' Directive and Researchers' Directive – the introduction of a multi-entry residence permit, allowing the holder to be absent from the EU territory for long periods without losing his or her residence right were already provided for in the Communication on Migration and Development in 2005.[143] Some of the special measures that were foreseen as beneficial to circular migration included fast-track admission procedures for highly- skilled migrants that were already legally resident in the EU, multi-annual residence/work permits for seasonal workers - a matter that was already proposed in the 2005 Communication - and facilitated re-entry for former trainees, allowing them to develop their skills.

Ensuring effective return was among the conditions and safeguards that the Commission foresaw in order to make circular migration work. Therefore, Member States were encouraged to make return for migrants an attractive option through the enactment of measures that reward 'bona-fide migrants', as well as measures supporting the reintegration of returning migrants.[144] In cases of an irregular stay after the expiration of a migrant's permit, readmission measures were envisaged, which were facilitated through readmission agreements between

140 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L 16.

141 Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service [2004] OJ L 375/12.

142 Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research [2005] OJ L 289.

143 European Commission, Communication, Migration and Development: Some concrete orientations, COM (2005) 390 final, Brussels, 1 September 2005, p.10.

144 Schneider and Wiesbrock, 'Circular Migration and Mobility Partnerships, Briefing paper, Directorate-General for Internal Policies, European Parliament', p. 6.

the EU or the Member States, and the countries of origin. The development of a set of criteria for monitoring future circular migration schemes was also part of the conditions and safeguards that were put forward by the Commission, as well as an assessment of the contribution of the relevant legal instruments that were designed to facilitate circular migration.[145]

The Commission's proposals were welcomed by the Council in December 2007. The adopted Council Conclusions on Mobility Partnerships and circular migration in the framework of the Global Approach to Migration[146] made it clear that circular migration should become an integral part of future Mobility Partnerships. The definition used in the document once again reconfirmed the temporary character of the migration at stake as follows: "(…) circular migration could be understood as the temporary, legal movement of people between one or more Member States and particular third countries, whereby third country nationals take up legal employment opportunities in the EU or persons legally residing in the EU go to their country of origin".

The Council came up with a set of "possible elements which could be addressed when facilitating circular migration" that included integration and the accompanying measures that would be available to migrants prior to their arrival in the EU, partnerships between labour market agencies of partner countries and Member States so as to better match supply and demand, improved mutual recognition of qualifications, measures to ensure return and readmission, an adequate legal framework to promote circular migration, and so on. As Pastore stressed, most of these elements were not specific to the management of circular migration, but rather they were part of a very traditional "linear" migration management approach.[147]

In line with the Policy plan on legal migration, the Commission proposed two legislative measures in 2007: a directive on the admission of highly qualified migrants in the EU, creating the so-called "EU Blue Card" that was adopted in 2009, and a directive establishing a single permit and a common set of rights for third country workers legally residing in the EU; this latter measure could

145 European Commission, Communication on circular migration and mobility partnerships between the European Union and third countries, COM (2007) 248 final, 16 May 2007, p. 12.

146 Council of the European Union, Council Conclusions on mobility partnerships and circular migration in the framework of the Global approach to migration, 2839th General Affairs Council meeting, Brussels, 10 December 2007.

147 F. Pastore, 'Circular Migration', Background note for the Meeting of Experts on Legal Migration, Rabat, 3-4 March 2008, (2008), p. 7.

not be agreed before the entry into force of the Treaty of Lisbon.[148] As Thym emphasised, by way of contrast to the instruments in the field of entry and border controls, reaching political agreement on new legal migration measures was not easy to obtain.[149]

The entry into force of the Treaty of Lisbon recalibrated the EU's competence in the field of economic migration and brought about changes to the decision-making process, which paved the way for the adoption of the legal instruments that were envisaged by the Policy Plan on legal migration on the basis of Article 79 TFEU.[150] The EU immigration policy that was conceived by the EU Treaties was based on "differentiated and selective admission process" that was provided by statutory rules decided by the EU legislature on the basis of the ordinary legislative procedure (Article 79 (2) TFEU).[151] In addition, this EU immigration policy was established as a "process of legal status change", allowing the EU to provide different permits depending on the circumstances of the individual case, including such not allowing an option of renewal as was the case for the Seasonal Workers' Directive.[152] However, the EU's established competence to adopt legal rules in the ambit of economic migration as a matter of principle, meant that the Member States were free to determine the volumes of third-country national workers coming to the EU (Article 79 (5) TFEU).[153]

Following the entry into force of the Treaty of Lisbon, the European Council adopted the Stockholm Programme in 2009, which provided the Justice and Home Affairs programme to cover the period 2010-2014.[154] The European Council invited the Commission to submit proposals before 2012 "on ways to further explore the concept of circular migration and study ways to facilitate orderly circulation of migrants, either taking place within, or outside, the framework of specific projects or programmes including a wide-ranging study on how relevant policy areas may contribute to and affect the preconditions for increased temporary and circular mobility".[155] Furthermore, the Justice and Home Affairs Council

148 See Chapter 5 for further detail.

149 D. Thym, 'Legal Framework for EU Immigration Policy', in K. Hailbronner and D. Thym (eds.), *EU Immigration and Asylum Law. A Commentary* (Second edn.: C. H. Beck /Hart/ Nomos 2016), p. 272.

150 For more detail, see Steve Peers et al., *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 2: EU Immigration Law* (Martinus Nijhoff Publishers, 2012). See also Thym, 'Legal Framework for EU Immigration Policy'.

151 Thym, 'Legal Framework for EU Immigration Policy', p. 276.

152 Ibid.

153 Ibid., p. 278.

154 Stockholm Programme, Council document 17024/09, adopted by the European Council on 10-11 December 2009.

155 Point 6.1.2.of the Stockholm Programme.

Conclusions at the end of 2009 stated that the Member States and the Commission were committed "to further examine issues which may have the potential to facilitate circular migration and voluntary return, such as portability of social rights, migrants' opportunities to return to their countries of origin for longer periods of time without losing their right to residence in countries of destination as well as the promotion of viable livelihood options in countries of origin".[156] The Council also called for an "in-depth qualitative and quantitative analysis in order to further explore the concepts of temporary and circular migration".[157]

In response to this invitation, the European Migration Network undertook a study entitled "Temporary and circular migration: empirical evidence, current policy, practice and future options", which was published in 2011.[158] The study concluded that despite the EU's focus on facilitating this type of migration, the policy and legal developments at the national level were still "in an embryonic stage" and were considerably diverse: whilst some of the Member States' policies contained elements of circular migration, they were not explicitly acknowledged. [159] It also stressed that the initial evaluations pointed to positive results for participating migrants.

The Treaty of Lisbon also made it possible to reach an agreement on the Single Permit Directive in early 2010, after the Council was deadlocked over this issue for more than three years.[160] In 2010, the Commission also proceeded with their proposals on the position of intra-corporate transferees and seasonal workers. The EMN study that evaluated the impact of the Stockholm Programme stressed that the adoption of the Seasonal Workers' Directive was a significant development with regards to circular migration and that this directive formalises "incremental work undertaken by Member States in this policy area throughout the period covered by the Stockholm Programme".[161]

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156 Council of the European Union, Council Conclusions on Migration for Development 2979th Justice and Home Affairs Council meeting Brussels, 30 November 2009, p. 2.

157 Ibid.

158 European Migration Network, 'Temporary and Circular Migration: empirical evidence, current policy practice and future options in EU Member States. Synthesis Report', (2011).

159 Ibid., p. 63.

160 For more details see Steve Peers et al., *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 2: EU Immigration Law*, p. 223.

161 European Migration Network, 'Synthesis Report contributing to evaluation of the Stockholm Programme 2010-2013 from the European Migration Network. A Descriptive Analysis of the Impacts of the Stockholm Programme 2010-2013', (2014), p. 22.

One of the interviewees that was involved in the Task Force on Temporary and Circular Migration that was coordinated by the European Policy Institute in the period 2010-2011 commented that the interest in this concept sharply declined after the report was published as a result of the "very difficult political context".[162] Therefore, it was not surprising that at the dawn of the next phase of the EU's Area of Freedom, Security and Justice for the period 2015-2020, none of the EU's institutional actors made a reference to the concept of circular migration in their respective policy agendas and programmes.[163] Nor was it mentioned in the European Agenda on Migration that was adopted as a response to the so called "refugee crisis" and the tragedies that took place in the Mediterranean Sea.[164] However, it kept being used as an instrument that was part of the framework of the GAMM,[165] including in the latest Mobility Partnership that was concluded with Belarus. Furthermore, it is also part of the Evaluation and Fitness Check of the European Commission.[166] A representative of an international organisation that was interviewed said that "(…) it lingers within the EU frameworks because it was mentioned as a point that nobody elaborated on and is part of all projects".[167] However, according to the interviewee, "it was out".[168]

4.4. The policy route for circular migration facilitation within GAMM

4.4.1. Circular migration initiatives incorporated in the Mobility partnerships

This section focuses on the development of the policy route for the facilitation of circular migration under the auspices of the GAMM as well as the activities that are linked to the implementation of EU's circular migration approach under the Mobility Partnerships[169] with the Eastern Partnership countries as of April 2017. It is extremely challenging to find publicly accessible information pertaining to

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162 Interview #14 with former think tank officer, Belgium, August 2013.

163 For more details, see also S. Carrera and E. Guild, 'The European Council's Guidelines for the Area of Freedom, Security and Justice 2020. Subverting the 'Lisbonisation' of Justice and Home Affairs?', CEPS Essays, No. 13 / 14 July 2014, Brussels, (2014), pp. 19 - 50.

164 See European Commission, Communication on a European Agenda on Migration, COM (2015) 240 final, Brussels, 13 May 2015.

165 European Commission, Report on the implementation of the Global Approach to Migration and Mobility 2012-2013, COM (2014) 96 final, Brussels, 21 February 2014.

166 European Commission, REFIT- Legal Migration Fitness Check, Indicative Road Map, p. 3 and p. 8.

167 Interview #28 with representative of international organisation, Austria, March 2017, Annex I.

168 Interview #28 with representative of international organisation, Austria, March 2017, Annex I.

169 For an overall picture on Mobility Partnerships, see N. Reslow, *'Partnering for mobility? Three-level Games in EU External Migration Policy'* (DPhil thesis, Maastricht University 2013).

the implementation of the Mobility Partnerships, and thus to find data in relation to the circular migration schemes or projects.[170] The only scoreboard[171] that is publicly accessible is the scoreboard that is used for the coordination of the implementation of the EU- Moldova Mobility Partnership.[172] For the rest of the Mobility Partnerships, the information used in this section was retrieved from the websites of the respective governments, through information requests that were addressed to EU and national governmental officials, as well as on the basis of interviews with national and EU experts and representatives of NGOs implementing projects under the Mobility Partnerships. The Mobility Partnership Facility, which is managed by the ICMPD, is expected to increase transparency and improve the accountability of these instruments.[173]

As was noted above, the geographical focus of the GAMM was extended to the neighbouring Eastern and South-Eastern regions. In addition, the inclusion of "mobility" in the framework's title aimed to explicitly show that using migration and mobility in a safe environment was an essential part of the EU's external relations.[174] Migration was understood as a general category covering both legal channels for migration and combating irregular migration. Mobility, on the other hand, was perceived as part of the general category of migration referring to the possibility to legally enter the territory of the EU and denoting the notion that the EU wanted to increase "the movement of persons".[175]

Circular migration was considered to cover many aspects of the GAMM: legal migration, development but also mobility.[176] Therefore, one interviewed Council official stated that sometimes it was difficult to take a decision as to whether to include it under the development or legal migration section of the documents. He stressed that the concept had received interest from the third country partners because it did not deprive them of their human resources and at the same time it

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170 Also stressed in Interview # 19 with representative of international organisation, Belgium, February 2017. In this regard, see also N. Reslow, 'Not everything that counts can be counted": Assessing 'success' of EU external migration policy', *International Migration,* 55/6 (2017).

171 According to the Commission, the scoreboards are internal Commission documents and they constitute the "basic monitoring tool" of the Mobility Partnerships. In Commission Communication 'Mobility Partnerships as a tool of the Global Approach to Migration', SEC (2009) 1240, p.5.

172 European Union – Republic of Moldova Mobility Partnership, Scoreboard - monitoring tool of the European Union - Republic of Moldova Mobility Partnership, retrieved at http://scoreboard.mfa.gov.md (accessed 23 November 2017).

173 ICMPD, Mobility Partnership Facility, retrieved at: https://www.icmpd.org/our-work/capacity-building/multi-thematic-programmes/mobility-partnership-facility-mpf/ (accessed 23 November 2017).

174 Interview # 8 with EU Council official, Belgium, February 2013, Annex I.

175 Interview # 8 with EU Council official, Belgium, February 2013, Annex I.

176 Interview # 8 with EU Council official, Belgium, February 2013, Annex I.

provided them with an opportunity to increase their skills and salary abroad.[177] However, there was no common understanding of circular migration within the framework of GAMM. One European Commission official stressed that when third countries were participating in Mobility Partnerships, they kept asking the Commission how to implement circular migration in practice, and they were then advised by the Commission to negotiate that with the participating Member States.[178] The Commission was promoting it as a potential additional initiative within the GAMM, but it did not have any role in proposing concrete measures or schemes.[179] Thus, one of the interviewees underlined that the GAMM tried to cover different interpretations of the concept and it therefore contributed to the lack of harmonisation at the EU level. [180]

Since 2008, five Mobility Partnerships have been signed with Eastern Partnership countries: Moldova, Georgia, Armenia, Azerbaijan and Belarus.[181] As a prerequisite to signing these partnerships, Moldova, Georgia, Armenia and Azerbaijan had to conclude readmission agreements that regulated the return of irregular migrants.[182] They also signed visa facilitation agreements. Belarus was an exception in this regard, as the signing of a Mobility Partnership preceded both the conclusion of a readmission and a visa facilitation agreement.[183]

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177 Interview # 8 with EU Council official, Belgium, February 2013, Annex I.

178 Interview #11 with European Commission official, Belgium, May 2013, Annex I.

179 Interview #11 with European Commission official, Belgium, May 2013, Annex I.

180 Interview #22 with representative of international organisation, March 2017, Annex I.

181 The EU-Moldova Mobility Partnership was signed in May 2008, the EU-Georgia in 2009, the EU - Armenia Mobility Partnership in 2011, and the Mobility Partnership between the EU and Azerbaijan was signed in December 2013 and the one with Belarus was signed in 2016.

182 The EU-Moldova visa facilitation agreement and readmission agreement entered into force in October 2007. An amended version of the visa facilitation agreement with Moldova entered into force in July 2013. The EU-Georgia visa facilitation agreement and readmission agreement entered into force in March 2011. The visa facilitation Agreement with Armenia was signed in December 2012 and the readmission agreement in April 2013. Both agreements entered into force in January 2014. The EU and the Republic of Azerbaijan signed a Visa facilitation Agreement in November 2013 and a Readmission Agreement in February 2014. Both agreements entered into force in September 2014. Source: European Commission, Mobility partnerships, visa facilitation and readmission agreements, retrieved at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/eastern-partnership/mobility-partnerships-visa-facilitation-and-readmission-agreements/index_en.htm (accessed 23 November 2017).

183 Even though the Commission submitted a formal invitation to open negotiations on visa facilitation and readmission agreements with the Belarusian authorities in June 2011, this invitation was only accepted in early 2014. The negotiations stalled because of concerns that were voiced by five Member States in relation to the security of Belarusian diplomatic passports voiced by five Member States. Belarus claimed that it needed financial and technical assistance from the EU in order to be able to develop biometric ID documents, digitalise its civil registry and prepare for the implementation of the future Readmission Agreement. Source: High Level Working Group on Asylum and Migration (HLWG), retrieved at: http://www.statewatch.org/news/2017/feb/eu-council-hlwg-migration-gamm-5657-17.pdf (24 January 2017).

EU - Moldova Mobility Partnership

In line with the EU's securitarian approach towards third countries, the greater part of the projects funded under the Mobility Partnership with Moldova aimed, at least partially, to prevent irregular migration, most notably those in the areas of readmission, border security, document security and information of migrants.[184] By way of contrast, there were "very few initiatives to foster circular labour migration between Republic of Moldova and the EU and they are limited to small scale, bilateral pilot schemes".[185]

On the basis of the evaluation report of the Mobility partnership, the interviewed Moldovan authorities stressed that one of the new priorities they would like to see under the Mobility Partnership was a greater focus on circular migration agreements and schemes.[186] According to one interviewee, there was a shift in the focus of the Mobility Partnership towards more initiatives covering asylum, migration and development.[187] Nonetheless, "there was very little done in the field of circular migration and the expectations are still very high". According to him, Member States lost their enthusiasm and motivation because "(…) Moldova did everything (…) visa liberalisation was the last achievement".[188]

With regards to labour migration, Moldova concluded a "Bilateral Agreement on Labour Mobility Between Italy and Moldova". One of the interviewees stressed, however, that this document was merely an updated version of an agreement that was already signed between the two countries in 2003.[189] The agreement aimed to establish a basis for collaboration between the two countries in order to regulate the flow of workers and to develop respective procedures for facilitating the employment of Moldovan citizens to work in Italy in case of shortages in the local workforce (Article 1). The agreement also provided for the encouragement of professional training of workers that were intending to migrate, in line with the skills that were needed in the Italian labour market (Article 3). Even though the agreement did not explicitly contain circular migration facilitation as a priority, seasonal workers were among its target groups (Article 5).

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184 The European Union Republic of Moldova Mobility Partnership 2008 -2011: Evaluation Report, prepared by IOM Moldova, 01.10.2012, p. 5.
185 The European Union Republic of Moldova Mobility Partnership 2008 -2011: Evaluation Report, p. 55.
186 The European Union Republic of Moldova Mobility Partnership 2008 -2011: Evaluation Report, p. 11.
187 Interview # 19 with representative of international organisation, Belgium, February 2017, Annex I.
188 Interview # 19 with representative of international organisation, Belgium, February 2017, Annex I.
189 Interview #27 with representative of international organisation, Austria, March 2017, Annex I.

A project supporting the implementation of this agreement also aimed to test a pilot circular migration scheme between Moldova and Italy.[190] Therefore, the project activities focused on creating conditions for potential migrants from Moldova to legally work in Italy for a predetermined period of time.[191] Around 200 potential migrants from Moldova were involved in a professional language course (such as in construction) and included in the database of the Italian Ministry as potential candidates to be employed in Italy in case of vacant jobs, which correspond to their qualification and/or skills.[192] The vast majority of trained workers were able to identify an employer on their own.[193] In addition, training courses for Moldovan wine makers were organised in Italy.[194]

Another project that was facilitated under the umbrella of the Mobility Partnership was "Better managing the mobility of health professionals in the Republic of Moldova" (2011-2014). This project aimed to promote legal and circular migration, to diminish the negative effects of brain drain and brain waste and to facilitate the reintegration of health professionals who were returning to the national health system.[195] The focus of the project activities was on the completion of a series of studies regarding the migration of health professionals, the creation of a database on health professionals' employment and mobility, training courses and an e-learning platform for migrant health professionals, and so on. The project also envisaged the promotion of bilateral agreements in the field of health personnel migration between Moldova and the EU Member States in line with the WHO Global Code of Practice for International Recruitment of Health Personnel, thereby promoting circular migration. A draft agreement was developed in 2014 and the invitation for starting negotiations on this matter has been sent to Italy, Spain, Portugal, Germany and Israel.[196]

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190 EU-Republic of Moldova Mobility Partnership: Information Newsletter, No 7, May 2013, p. 9, retrieved from: http://www.mfa.gov.md/img/docs/bulletin-information_7_en.pdf

191 See also ICMPD, 'Overview of the EU Mobility Partnership Instrument. Summary of the Initiatives in Georgia and Moldova', (2016), p. 33.

192 European Training Foundation, 'Inventory of Migrant Support Measures from an Employment and Skills Perspective. Armenia', (2015), p. 23.

193 This information was additionally provided by interviewee # 19, Belgium, February 2017, Annex I.

194 Interview # 19 with representative of international organisation, Belgium, February 2017, Annex I.

195 World Health Organisation, Better managing the mobility of health professionals in the Republic of Moldova – context, challenges, and lessons learned, retrieved at: http://www.euro.who.int/en/countries/republic-of-moldova/news/news/2015/03/better-managing-the-mobility-of-health-professionals-in-the-republic-of-moldova-context,-challenges,-and-lessons-learned (accessed 23 November 2017).

196 Presentation of Dr. Eugenia Berzan, Ministry of Health, Republic of Moldova, Applicability of the WHO Global Code of Practice on the International Recruitment of Health Personnel: Experience of the Republic of Moldova on Bilateral Agreements, Lisbon, 16 June 2014.

Two of the interviewees described the "Making Migration in Moldova Work for Development" initiative as a successful circular migration policy project.[197] One of its main objectives was to test whether Moldova and Germany could establish a "triple win" circular migration scheme by engaging diaspora members.[198] According to one of the interviewed representatives of an international organisation, this initiative was based on an amendment of the relevant German legislation, which allowed citizens of Moldova, Georgia, Armenia and Morocco to be absent from the territory of the country for up to two years without losing their permits.[199] The idea was for diaspora members to be given the possibility to go back to their countries of origin and share their knowledge, experience and expertise, and then to return back to Germany.[200]

EU-Georgia Mobility Partnership

At the genesis of the implementation of the EU-Georgia Mobility Partnership, the emphasis was mainly placed on readmission and re-integration activities. However, the scoreboard version as of early 2017 suggested that there were more and more activities that focus on legal migration and diaspora engagement.[201] The three-year project "Strengthening the development potential of the EU mobility partnership in Georgia through targeted circular migration and diaspora mobilisation" piloted a circular migration scheme, which was part of the joint operation that was referred to as the "Centre for International Migration and Development" (CIM) that was managed by the Federal Employment Agency and the German organisation GIZ. It involved the circular migration of low and highly-skilled workers between Germany and Georgia. The project implementation partners defined circular migration as follows:

> "(…) The mobility of people between countries, including multiple temporary or long-term movement which may be beneficial to, and harnessing development of all involved (migrants, countries of origin and destination, including the respective societies and individuals), if occurring voluntarily

197 Interview #27 with representative of international organisation, Austria, March 2017.

198 Migration for development, Making Migration in Moldova Work for Development, retrieved at: http://www.migration4development.org/en/projects/making-migration-moldova-work-development (accessed 23 November 2017). See also European Union – Republic of Moldova Mobility Partnership, Scoreboard - monitoring tool of the European Union - Republic of Moldova Mobility Partnership, http://scoreboard.mfa.gov.md/project/view/262 (accessed 23 November 2017).

199 Interview #27 with representative of international organisation, Austria, March 2017, Annex I. Interview # 19 with representative of international organisation, Belgium, February 2017, Annex I.

200 Interview # 19 with representative of international organisation, Belgium, February 2017, Annex I.

201 This scoreboard was obtained in February 2017.

and linked to the migrants' rights and competencies and their development as well as to economic opportunities of countries of origin and destination".

Workers could work in Germany for 18 months on the basis of a work contract that they signed before they departed from Georgia.[202] 28 participants (15 nurses and 13 hotel and restaurant staff members) were selected for placement with German employers and during the project there were three dropouts.[203] Nurses had to go through the recognition of qualifications procedure in line with the relevant German legislation because there were "major differences in the qualification 'nurse' between Georgia and Germany".[204] They undertook German language courses whilst they were still in Georgia and they received professional training when they were working in Germany, which took up to one year and concluded with an exam.[205]

The aim of the project was for these workers to contribute their expertise towards Georgia's development as a result of the knowledge and experience they gained in Germany. According to one interviewed state official, the Georgian nurses would not need to redo the recognition process upon their return.[206] However, in the future an additional recognition system for returning migrants would have to be elaborated.[207]

Some of the participants commented that the permitted period under this pilot scheme was too short and that they were just starting to professionally develop as the scheme was drawing to a close.[208] Even though the project ceased in May 2016, some of the nurses were still in Germany as of March 2017.[209] As one interviewee stressed in 2014, the project could not be considered as a failure just because some of the participants decided to prolong their stay in Germany, as this was an indication of a problem, thereby preventing them from returning to Georgia.[210] In line with that, the project was regarded as successful by the Georgian authorities and there was some interest in continuing with this kind of scheme with other

202 Interview # 24 with former MP project assistant, Georgia, March 2017, Annex I.
203 Interview # 24 with former MP project assistant, Georgia, March 2017, Annex I.
204 Interview # 18 with state official, Georgia, November 2014, Annex I.
205 Interview # 24 with former MP project assistant, Georgia, March 2017, Annex I.
206 Interview # 18 with state official, Georgia, November 2014, Annex I.
207 Interview # 18 with state official, Georgia, November 2014, Annex I.
208 Interview # 24 with former MP project assistant, Georgia, March 2017, Annex I.
209 Interview # 24 with former MP project assistant, Georgia, March 2017, Annex I.
210 Interview # 18 with state official, Georgia, November 2014, Annex I.

Member States on the basis of the Manual on Circular Migration Scheme that was developed as part of the project outputs.[211]

Another component of this project concerned the return of diaspora members to Georgia, which was discussed in the section on Moldova above.[212] In addition, the Dutch Ministry of Foreign Affairs and the IOM implemented the "Temporary Return of Qualified Nationals" project that covered up to 45 assignments to Georgia from diaspora members in the Netherlands.[213] The project was positively assessed by one of the interviewed state officials.[214]

Georgia has also signed and ratified a bilateral agreement on legal stay, labour and circular migration with France in November 2013. By the time of the interview in early 2017, the French committee that was in charge of the ratification had still not given its green light to the ratification due to questions pertaining to migration and security.[215] Finally, since the end of 2015 the IOM has been implementing another initiative that aims to promote circular migration under the project "Piloting Temporary Labour Migration of Georgian workers to Poland and Estonia".[216]

According to one of the interviewed state officials "Circular migration is something that is developing on a daily basis in Georgia, especially with the visa liberalisation process, in terms of public awareness and policy decision making (…)".[217] The Georgian authorities were relying on these pilot circular migration projects because they were planning to use the experience in order to set up a state migration system.[218] The government was interested in developing outward as well as inward circular migration policies in order to foster legal economic migration of Georgians and migrants coming to Georgia and to provide an alternative to the irregular migration that is undertaken by many Georgians.[219] Another interviewed

211 Interview # 24 with former MP project assistant, Georgia, March 2017, Annex I. Interview # 25 with state official, Georgia, March 2017, Annex I.
212 For more information, see Centre for International Migration and Development, Return to Georgia, retrieved at: http://migration-georgia.alumniportal.com/project-components/return-to-georgia.html (accessed 23 November 2017).
213 Interview # 25 with state official, Georgia, March 2017, Annex I.
214 Interview # 18 with state official, Georgia, November 2014, Annex I.
215 Interview # 25 with state official, Georgia, March 2017, Annex I.
216 ICMPD, 'Overview of the EU Mobility Partnership Instrument. Summary of the Initiatives in Georgia and Moldova', p. 15. For more details, see International Organisation for Migration, Mission to Georgia, Temporary Labour Migration of Georgian Workers to Poland and Estonia Pilot Project Kicks Off, retrieved at: http://iom.ge/1/temporary-labour-migration-georgian-workers-poland-and-estonia-pilot-project-kicks (accessed 12 December 2017).
217 Interview # 25 with state official, Georgia, March 2017, Annex I.
218 Interview # 25 with state official, Georgia, March 2017, Annex I.
219 Interview # 18 with state official, Georgia, November 2014, Annex I.

expert commented that circular migration was important because the country did not want to lose any more of its citizens due to emigration.[220]

EU-Armenia Mobility Partnership

On the basis of the list of activities under the EU-Armenia Mobility Partnership that is available via the website of the State Migration Service, the European Training Foundation (ETF) concluded "that despite the multifaceted potential of the Mobility Partnership in facilitating circular migration, the focus has been, to date, on the return and reintegration of migrants".[221] According to one of the interviewees, Armenia was interested in focusing more on labour migration issues because there were many Armenians that wanted to circulate to the EU rather than to Russia.[222] At the time of the interview, labour migration and circular migration was taking place in an unregulated manner (apart from the diaspora engagement project operated by GIZ, described above). According to him, however, there was no interest in stimulating this kind of migration among the EU Member States.[223]

The "Support of Circular Migration and Re-integration Process in Armenia" project was explicitly related to circular migration. The project aimed to protect the rights of migrants whom left for work abroad, the reintegration of labour/circular migrants and to prevent irregular migration in line with the State Action Plan for Migration (2012-2016).[224] However, it did not actually involve any actual circular migration scheme.

An initiative that could lead to facilitation of circular migration between Armenia and France is the bilateral agreement for the exchange of students, interns, young professionals between 18 and 35 years-old and qualified specialists (Articles 2-4 of the Draft Agreement), which is pending ratification on the French side.[225] The authorised duration of employment is planned to be between six and 12 months for young professionals and this may be prolonged up to maximum of 24 months in line with their contract. The authorisation of the work permit for Armenians who wish to work in France is conditional upon a labour market test (Article 3.4).

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220 Interview #27 with representative of international organisation, Austria, March 2017, Annex I.
221 European Training Foundation, 'Inventory of Migrant Support Measures from an Employment and Skills Perspective. Armenia', p. 39.
222 Interview #20 with representative of international organisation, Armenia, February 2017, Annex I.
223 Interview #20 with representative of international organisation, Armenia, February 2017, Annex I.
224 European Training Foundation, 'Inventory of Migrant Support Measures from an Employment and Skills Perspective. Armenia', p. 32.
225 Project d'accord de partenariat migratoire entre le gouvernement de la Republique Francaise et le gouvernement de la Republique D'Armenie provided by the French Embassy in Yerevan in March 2017.

The number of young professionals from France or Armenia that are admitted to work on the territory of the other contracting party must not exceed 100 per year for each party (Article 3.5). The accepted qualified specialists from Armenia are entitled to receive a one-year residence permit with a maximum validity of three years in line with the relevant French legislation (Article 4.3). They can also benefit from certain family reunification provisions (Article 4.4.).

One of the interviewees commented that the elaboration of this agreement took a very long time and the draft was only finalised in late 2016.[226] It was initiated by the Armenian government and it was based on the good ties between the two countries, as well as Armenia's experience of concluding bilateral agreements with some of the Gulf countries that led to the circular migration of doctors and nurses. According to one interviewee, the negotiations took so long because France was "not very keen to facilitate or encourage Armenian migration in whatever form to France because of the already existing diaspora and the pull factor that they might attract more migrants".[227]

EU-Azerbaijan Mobility Partnership

According to the scoreboard on the Mobility Partnership with Azerbaijan and the information that has been provided by some of the interviewees in March 2017, there was only one project concerning labour migration that was called the "Support to the Implementation of the Mobility Partnership with Azerbaijan" (MOBILAZE) which has been implemented by the ICMPD.[228] One of the project activities of component 2 "Legal Migration from and to Azerbaijan" of the project proposal that was developed by the ICMPD contained a review of the existing circular migration schemes in the EU with a view to its implementation in Azerbaijan. Yet, when this activity was due for implementation, the beneficiaries did not view this as a priority and it was ultimately not included in the scope of the "Review of legal and labour migration mechanisms in the Republic of Azerbaijan".[229]

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226 Interview #20 with representative of international organisation, Armenia, February 2017, Annex I.

227 Interview #20 with representative of international organisation, Armenia, February 2017, Annex I.

228 Interview #19 with representative of international organisation, Belgium, February 2017, Annex I. More information about the project is available at the following link: https://www.icmpd.org/our-work/capacity-building/multi-thematic-programmes/support-to-the-implementation-of-the-mobility-partnership-with-azerbaijan-mobilaze/ (accessed 12 December 2017).

229 This information was provided by an ICMPD officer via e-mail. The Assessment Report: Review of legal and labour migration mechanisms in the Republic of Azerbaijan can be accessed here: https://www.icmpd.org/fileadmin/user_upload/Com2_Assessment_report_FINAL_EN.pdf (accessed 12 December 2017).

The other activity foreseen under this component envisaged the identification of needs, priorities and opportunities by the Azerbaijani authorities for the negotiation and conclusion of bi- and multilateral labour migration, circular migration and/or social protection agreements with potential partner countries. According to the Flash report on the project's implementation,[230] the Ministry of Labour and Social Protection of Population did not consider these activities to be an immediate priority because they already had on-going negotiations with other non-EU countries.[231]

EU-Belarus Mobility Partnership

At the time of the interviews in March 2017, there was still no agreement on the annex, which is part of the Joint Declaration on the Mobility Partnership between Belarus and the Member States.[232] In addition, due to the lack of efficient inter-institutional coordination between the ministries that are responsible for the implementation of the Mobility Partnership, the authorities were not aware of what they could do under its aegis. Therefore, the ICMPD planned to organise an event under the Mobility Partnership Facility.[233] Therefore, there were only two activities in the pipeline: a project awarded to the IOM for the establishment of a detention centre and the preparation of a strategy on the fight against irregular migration, as well as an initiative organised by ICMPD under the MIUEX Belarus Action,[234] which aimed to introduce the international labour migration and migration-related conventions and standards and to assess the national legislation with a view to the possible ratification thereof.[235]

On the basis of the gathered empirical data it became clear that the only possibility for facilitating circular migration under the Mobility Partnerships with the Eastern Partnership countries, which is not based on a pilot project or bilateral agreement, is on the basis of the Polish simplified procedure for work without the need for a work permit, referred to in this study as the *Oświadczenie* procedure. This instrument is presented in more detail in Chapter 6. What is important to stress, however, is that some of the interviewees working on the implementation of the

230 Retrieved at: https://www.icmpd.org/fileadmin/user_upload/MOBILAZE_flash_report_June_2017.pdf (accessed 12 December 2017).
231 This information was provided by an ICMPD officer.
232 Interview #26 with representative of international organisation, Belarus, March 2017, Annex I.
233 Interview #26 with representative of international organisation, Belarus, March 2017, Annex I.
234 MIgration EU eXpertise (MIEUX) is a joint EU-ICMPD initiative. For more information see https://www.icmpd.org/our-work/capacity-building/multi-thematic-programmes/mieux-iii/ (accessed 12 January 2018).
235 Interview #26 with representative of international organisation, Belarus, March 2017, Annex I.

Mobility Partnerships in the different countries shared that there was not enough available and accessible information about these opportunities and therefore the number of migrants whom utilised these opportunity was, as a result, very low.[236]

4.4.2. Circular migration fostered on the basis of visa facilitation and visa liberalisation instruments[237]

Visa facilitation agreements

A visa policy instrument that is widely used as part of the GAMM are the visa facilitation agreements.[238] Its aim is to facilitate the issuance of short-stay Schengen visas for third-country nationals and thus to foster mobility.[239] With slight variations, all of the agreements state that visa-free travel regime is their ultimate objective.[240] They contain broadly similar provisions, aiming *inter alia* to simplify the application process by listing the documentary evidence regarding the purpose of the journey for different categories of persons; more precise conditions for the issuance of multiple-entry visas for different categories of travellers compared to Article 24 (2) of the Visa Code; a reduction in the fees for processing visa applications from 60 EUR to 35 EUR; a list of categories of persons who can benefit from a visa waiver; shortening the length of the visa application process from 15 to ten calendar days and certain exceptions to this rule.[241] The EU has signed visa facilitation agreements with 12 countries altogether, including all of the Eastern Partnership countries, except from Belarus.

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236 Interview #20 with representative of international organisation, Armenia, February 2017. Interview # 25 with state official, Georgia, March 2017.

237 Parts of this section is based on P. V. Elsuwege and Z. Vankova, 'Migration and Mobility in the EU's Eastern Neighbourhood: Mapping out the Legal and Political Framework', in F. Ippolito, G. Borzoni, and F. Casolari (eds.), *Bilateral relations in the Mediterranean: Prospects for migration issues* (Cheltenham: Edward Elgar, forthcoming).

238 Even though readmission agreements are intertwined with the visa facilitation agreements, they do not constitute part of the present analysis. For more information see ibid.

239 P. G. Andrade, I. Martin, and S. Mananshvili, 'EU cooperation with third countries in the field of migration', (2015), p. 40.

240 F. Trauner and I. Kruse, 'EC Visa Facilitation and Readmission Agreements: A New Standard EU Foreign Policy Tool?', *European Journal of Migration and Law* 10/4 (2008), p. 421.

241 For more details see S. Peers, 'Visa Facilitation', in S. Peers, E. Guild, and J. Tomkin (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 1: Visas and Border Controls* (Martinus Nijhoff Publishers, 2012), p. 318. Trauner and Kruse, 'EC Visa Facilitation and Readmission Agreements: A New Standard EU Foreign Policy Tool?', p. 424.

Visa liberalisation dialogues

In order to establish a visa-free regime with a particular third country, the EU has introduced the so-called Visa Liberalisation Dialogues. These instruments are structured around four thematic areas, in which the candidate country needs to improve its legal and policy framework and demonstrate the effective implementation thereof in relation to the following matters: document security, including the introduction of biometric passports; border management, including irregular migration and readmission, asylum and migration management; public order and security and external relations and fundamental freedoms.[242] The dialogues can be compared to a mini-accession process, as they have a high degree of leverage.[243] The reforms that the candidate-country need to undertake are included in a Visa Liberalisation Action Plan. One of the interviewed officials stated that the process requires "(…) a total reform of the candidate's law enforcement system, except for prisons (…)".[244] The progress of the candidate-countries is monitored by Commission officials and by the Member States on the basis of set of benchmarks in these four areas; progress reports are also published annually.

Up to date visa liberalisation dialogues have been initiated with Ukraine (2008), Moldova (2010) and Georgia (2012). In 2014, a visa-free regime for holders of biometric passports was introduced in Moldova as a result of the successful visa liberalisation dialogue negotiations. Furthermore, in 2016 the Commission presented a proposal to amend the Visa List Regulation 539/2001 in order to move Ukraine and Georgia to the positive list because they had met the benchmarks for visa liberalisation. In February 2017, the Regulation amending the Visa List Regulation moved Georgia from Annex I (countries whose nationals need a visa to enter the Schengen area) to Annex II (visa free countries) after this was approved by the European Parliament and came into force in March 2017. The Council adopted a Regulation on visa liberalisation for Ukrainian citizens travelling to the EU on 11 May 2017.

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242 Raül Hernández i Sagrera, 'The Impacts of Visa Liberalisation in Eastern Partnership Countries, Russia and Turkey on Trans-border Mobility. Study for the LIBE Committee', (2014), pp. 14-15. Andrade, Martin, and Mananshvili, 'EU cooperation with third countries in the field of migration', p. 30.

243 Andrade, Martin, and Mananshvili, 'EU cooperation with third countries in the field of migration', p. 30. This was also mentioned in interview #11 with European Commission official, Belgium, May 2013.

244 Interview #11 with European Commission official, Belgium, May 2013, Annex I.

The Common Visa Application Centres are another relevant operational visa instrument.[245] Its aim is to facilitate the visa application procedure in countries where the majority of the Member States do not have consular representation by authorising one Member State to issue visas for the whole Schengen area.[246] In the context of the Eastern Partnership, there is one such centre in Chisinau, Moldova, with Hungary being in charge of the visa applications.[247]

Despite all of the supposed visa "facilitating" features of these agreements and the positive evaluation of the Commission,[248] research has shown that their real impact is limited – it does not remedy the complex application procedure, its length and the issuance of multi-entry visas, provided for by the Visa Code.[249] Furthermore, the renegotiated agreements with Moldova and Ukraine did not provide for much improvement either.[250] With regards to the multi-entry visas, however, they brought positive change by limiting the discretion of the Schengen Member States in relation to the validity of those permits.[251] Moreover, the establishment of a Common Visa Application Centre in Moldova has had a positive impact according to researchers and it has eased the visa application process for those individuals whom do not possess a biometric passport.[252]

The aim of the Visa liberalisation process is to ultimately lead to a visa-free regime with a particular third country. It eases travel because it waives the whole visa application process and all of the administrative and financial hurdles related thereto. However, it should be borne in mind that it only provides for short-term travel and thus it excludes the possibility to foster short-term labour mobility, unless special authorisation is obtained. Furthermore, only those individuals that hold biometric passports can benefit from the visa liberalisation process.

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245 See The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C 115 of 4.5.2010, p. 58.

246 Raül Hernández i Sagrera, 'The Impacts of Visa Liberalisation in Eastern Partnership Countries, Russia and Turkey on Trans-border Mobility. Study for the LIBE Committee', p. 21.

247 Available at: http://www.cac.md/index_en.html

248 European Commission, Evaluation of the Implementation of the European Community's Visa Facilitation Agreements with Third Countries, SEC (2009) 1401 final, p. 9.

249 Andrade, Martin, and Mananshvili, 'EU cooperation with third countries in the field of migration', p. 40. For more details see also Agnieszka Weinar et al., 'Consequences of Schengen Visa Liberalisation for the Citizens of Ukraine and the Republic of Moldova', MPC Research Report 2012/01, (2012).

250 Andrade, Martin, and Mananshvili, 'EU cooperation with third countries in the field of migration', p. 41.

251 Ibid., p. 44.

252 Ibid., p. 122.

Thus, one can conclude that these EU measures facilitate personal travel and entry for temporary visits, on the basis of multi-entry visas and the Visa Application Centres, as well as the Visa liberalisation process, and thus it does have the potential to foster circular migration. However, they provide limited opportunities because they will very much depend on where the migrant comes from, whether he or she has a biometric passport or has become eligible for a multi-entry visa. These instruments, however, can contribute to the initiation of individual circular migration projects and other employment possibilities because they can facilitate job-seeking. They can lead to short-term employment, as well to long-term circular migration opportunities, which would need to be authorised under the national legislation of the particular Member State.

4.4.3. Circular migration in the context of the European Neighbourhood Policy and the Eastern Partnership instruments[253]

Association agreements

Since the geographical focus of this study is on the Eastern Partnership countries, circular migration should also be examined as part of the European Neighbourhood Policy (ENP), which acknowledges that perspectives for lawful migration and movement of persons, on the one hand, and common efforts to combat irregular migration as well as the establishment of efficient mechanisms for return, on the other, are crucial determinants for successful cooperation with the EU's neighbouring countries.[254] This is also one of the regional dimensions of the ENP.

The Partnership and Cooperation Agreements (PCAs) that were concluded with the post-Soviet States from the 1990s onwards contain migration-related provisions, which evolved over the years to essentially reflect the state of development of the EU's migration policy. Therefore, it will come as no surprise that the latest generation of Association Agreements that were signed in 2014 with Ukraine, Moldova and Georgia, all include broadly defined migration clauses.[255]

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253 This section is based on the research that is found in Elsuwege and Vankova, 'Migration and Mobility in the EU's Eastern Neighbourhood: Mapping out the Legal and Political Framework'.

254 European Commission, Communication Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours, COM (2003) 104 final, Brussels, 11 March 2003, p. 11 and European Commission, Communication European Neighbourhood Policy Strategy Paper, COM (2004) 373 final, Brussels 12 May 2004, p. 23.

255 Article 16 of the Association Agreement with Ukraine, OJ, 2014, L 161/11; Article 14 of the Association Agreement with Moldova, OJ, 2014, L 260/11; Article 15 of the Association Agreement with Georgia, OJ, 2014, L 261/11.

The preambles to the Agreements with Moldova and Georgia explicitly refer to circular migration as an integral part of the migration dialogue, unlike the agreement that has been signed with Ukraine. A specific provision on the 'movement of persons' recalls the parties' commitment to fully implement the bilateral readmission and visa facilitation agreements as well as their shared ambition to establish a visa-free regime 'in due course'.[256] The EU-Ukraine Association Agreement is significantly more developed in the sense that it also has articles that are devoted to 'mobility of workers' and the 'treatment of workers', which are absent in the Association Agreements with Moldova and Georgia.[257] This implies that the EU Member States should preserve – and if possible improve – the existing facilities of access to employment for Ukrainian workers. Apart from that, however, the Association Agreements with the Eastern Partnership countries do not to create any additional opportunities for enhancing the mobility of their citizens, despite the fact that this is one of the core objectives of the Eastern Partnership.[258]

Political dialogues

There are several regional dialogues, serving as multilateral frameworks for cooperation on migration issues between the Member States and third countries, with which the EU is partnering.[259] The ones that involve Eastern Partnership countries are the Prague Process, the Budapest Process and the Eastern Partnership Panel on Migration and Asylum. These dialogues offer different fora, whereby representatives of the participating countries meet in various settings to discuss issues of common interest and exchange information, mainly within the priorities of the GAMM.

The Prague Process was established in 2009 following the adoption of a "Building Migration Partnerships" Joint Declaration that was undertaken at a Ministerial conference in Prague and it is the EU's overarching regional framework in relation to the east.[260] Its aim is to implement the objectives of the GAMM in the Eastern

256 Article 19 of the Association Agreement with Ukraine; Article 15 of the Association Agreement with Moldova; Article 16 of the Association Agreement with Georgia.
257 Articles 17 and 18 of the Association Agreement with Ukraine.
258 For a detailed discussion, see Elsuwege and Vankova, 'Migration and Mobility in the EU's Eastern Neighbourhood: Mapping out the Legal and Political Framework'.
259 European Commission, Report on the implementation of the Global Approach to Migration and Mobility 2012-2013, COM (2014) 96 final, Brussels, 21 February 2014, p. 10.
260 See also European Commission, Communication on the Global Approach to Migration and Mobility, COM (2011) 743 final, Brussels, 18 November 2011, p. 8.

and South-Eastern regions.[261] This process is led by Poland and it involves 50 countries, among which are the EU Member States, the non-EU Schengen States and partners from the EaP countries, Central Asian countries, Western Balkan countries, Turkey and Russia, and it also engages EU bodies (European Commission, FRONTEX, Europol) as well as international organisations (UNHCR, IOM).[262] The work of this regional process is supported by a network of national contact points and a secretariat at the ICMPD.

This dialogue operates on the basis of Joint Ministerial Declarations and an Action Plan (2012-2016), covering the pillars of the GAMM.[263] The European Commission provided funding of 3 million EUR for the implementation of the Action Plan through the "Prague process targeted initiative", which consisted of seven pilot projects that operationalise its priorities. The main outcomes of the initiatives were, amongst other things, capacity-training and workshops, the exchange of good practices, the gathering of information in the form of migration profiles of the participating countries and the elaboration of guidelines and study visits.[264]

A Prague Process Handbook on Managing Labour and Circular Migration was produced as part of the Pilot Projects on Legal Migration and on Migration and development within the Prague Process Targeted Initiative that is funded by the EU. One of the interviewed representatives of ICMPD commented that the Prague Process brought together many different countries, which through "true dialogue and through constant meetings and discussing expert issues" were supposed to harmonise the concepts that they were using and to start using the same definitions over time.[265] The interviewee said that the guidelines contained in the Handbook led to legislative changes in some countries. However, the respondent stressed that ICMPD could have provided much more advice to the whole process and to the conceptualisation thereof, but the framework behind the Prague Process format, whereby the EU Member States were behind the wheel, did not

261 Prague Process Senior Officials' Meeting, "Five years of the Prague Process: Taking Stock and Moving Forward", Discussion paper, 28–29 October 2014, Berlin, p. 3 retrieved from http://pp.duvinet.hu/en/news-events/news/126-the-prague-process-senior-officials-meeting-in-berlin-28-29-october-2014 (accessed 5 April 2016); See also European Commission, Communication on the Global Approach to Migration and Mobility, COM (2011) 743 final, Brussels, 18 November 2011, p. 8.

262 European Commission, Report on the implementation of the Global Approach to Migration and Mobility 2012-2013, COM (2014) 96 final, Brussels, 21 February 2014, p. 10.

263 Adopted at the second Ministerial Conference of the Prague Process on 4 November 2011 in Poznan.

264 European Commission, Report on the implementation of the Global Approach to Migration and Mobility 2012-2013, COM (2014) 96 final, Brussels, 21 February 2014, p. 10.

265 Interview #28 with representative of international organisation, Austria, March 2017.

permit this.[266] Moreover, it was not among the priorities of the Member States to promote this type of migration.[267] Furthermore, in most of the cases there were few Member States and a large number of participating third countries, which made "it difficult to sell the results and implement it".[268] Therefore, the "policy products that came out of the Prague Process were fairly weak".[269]

The Budapest Process was established as a consultative forum in 1991 and it engages over 50 countries and ten international organisations and it aims to develop comprehensive and sustainable systems for orderly migration.[270] It shares a lot of similarities with the Prague Process in terms of participating countries and international organisations, implementation, funding and structure.[271] Both processes also generally share the same thematic priorities. On of the main projects within the Budapest Process aims to implement the Silk Routes Partnership for Migration by strengthening the migration management capacities of the Silk Routes countries - Afghanistan, Iraq and Pakistan.[272] An interviewee said that its added value was the different geographical and thematic focus: "migration flows from, in and through".[273]

The Eastern Partnership Panel on Migration and Asylum is the platform for dialogue on migration, mobility and asylum between the Eastern Partnership countries and the EU, which was established in 2011 and continues the work that was previously undertaken by the Söderköping Process.[274] The Panel is established under one of the multilateral Eastern Partnership platforms and it is devoted to "Democracy, good governance and stability". Similar to the aforementioned dialogues, it follows the principles of the GAMM by promoting cooperation and

266 Interview #28 with representative of international organisation, Austria, March 2017, Annex I. Interview #22 with representative of international organisation, Austria, March 2017, Annex I.
267 Interview #22 with representative of international organisation, Austria, March 2017, Annex I.
268 Interview #22 with representative of international organisation, Austria, March 2017, Annex I.
269 Interview #22 with representative of international organisation, Austria, March 2017, Annex I.
270 European Commission, Report on the implementation of the Global Approach to Migration and Mobility 2012-2013, COM (2014) 96 final, Brussels, 21 February 2014. p. 11.
271 S. Carrera, R. Radescu, and N. Reslow, 'EU External Migration Policies. A Preliminary Mapping of the Instruments, the Actors and their Priorities. EURA-NET project report', (2015), p. 31. For more information, see also https://www.budapestprocess.org/about (accessed 12 April 2016).
272 Budapest Process, Support to the Silk Rout Partnership for Migration under the Budapest Process, retrieved from https://www.budapestprocess.org/projects/silk-routes-partnership-project (accessed 5 March 2017).
273 Interview #22 with representative of international organisation, Austria, March 2017, Annex I.
274 Report on the implementation of the Global Approach to Migration and Mobility 2012-2013, COM (2014) 96 final, Brussels, 21 February 2014, p.11.

dialogue towards the harmonisation of policies and practices.[275] The Panel operates on the basis of two Panel meetings and two expert workshops each year in line with an annual work programme, and it is funded by the EU. This panel was described as "a coordination mechanism" by one of the interviewees.[276]

All of the Eastern Partnership countries participate in the three multilateral regional dialogues that were discussed above. Furthermore, most of the objectives of the dialogue platforms fall within the ambit of the GAMM. This overlap of participating states and thematic objectives, as well as the soft cooperation nature of these dialogues, raises the question of their added value, which has already been recognised as a problem by the Council[277] and by the Commission.[278] Nevertheless, they are claimed to have contributed to the political relations with the participating countries outside the EU.[279]

4.5. Conclusion to Chapter 4

This chapter has demonstrated that the circular migration concept entered the EU level through the policy efforts at the international level aimed to maximise the positive effects of the migration-development nexus. At the EU level it was perceived as a policy tool for migration management, which is to be facilitated through legal instruments and through formal, bilateral and multilateral, programmes and projects. A main difference with the international discourse was that at the EU level there was an additional securitarian rationale. Circular migration became one of the instruments of Directorate General for Migration and Home Affairs and part of its securiatrian approach to migration putting emphasis on return and readmission, rather than on facilitation of legal migration.

This chapter also focused on the implementation of circular migration initiatives under the framework of the GAMM and the Eastern Partnership. Despite the myriad initiatives, dialogues and agreements, in practice circular migration is hardly facilitated as part of the GAMM. There are several bilateral agreements,

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275 Eastern Partnership Panel on Migration and Asylum, retrieved at: http://eapmigrationpanel.org/en/about-panel (accessed 5 March 2017).

276 Interview #22 with representative of international organisation, Austria, March 2017, Annex I.

277 Council of the European Union, Council Conclusions on the Global Approach to Migration and Mobility, 9417/12, point 37.

278 Report on the implementation of the Global Approach to Migration and Mobility 2012-2013, COM (2014) 96 final, Brussels, 21 February 2014, p. 14.

279 Council of the European Union, Council Conclusions on the Global Approach to Migration and Mobility, 9417/12, point 37.

which could lead to small-scale facilitation if the respective Member States are able to overcome their reluctance to open new channels for legal migration. Apart from that, most of the initiatives are based on pilot projects with uncertain future. The next chapter assesses the circular migration elements that have been incorporated into the adopted EU legal instruments.

CHAPTER 5:

The "circularity" of the EU labour migration legal instruments[1]

5.1. Introduction

Chapter 3 of this study proposed a framework for analysis based on standards that have been respectively developed at the international and European level - which are in turn capable as serving as aspirational targets for the management of circular migration - as well as the policy instruments that the academic and policy literature outlines as being conducive to circular migration. It is the aim of this chapter to apply the elaborated analytical framework to the existing EU legal instruments that relate to circular migration in order to assess the extent to which they are able to foster rights-based circularity.

There are several categories of EU legal instruments that must be taken into consideration when assessing the circularity of the EU's labour migration policy. These are: the legal instruments which explicitly mention, amongst their aims, the facilitation of circular migration: the Seasonal Workers' Directive[2] and the Blue Card Directive;[3] instruments that do not explicitly mention the term circular migration, but contain elements of circular migration that may foster this type of

1 Parts of this chapter are pending publication in Vankova, Z. (forthcoming): EU's approach to Circular Migration in the context of the Eastern Partnership Neighbourhood. In Carrera, S., Den Hertog, L., Kostakopoulou, D. & Panizzon, M. (eds.) *The EU External Policies on Migration, Borders and Asylum. Policy Transfers or Intersecting Policy Universes?,* (Brill Martinus Nijhoff Publishers).

2 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94.

3 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/17.

migration: the EU Visa Code,[4] the EU Visa Regulation,[5] the Local Border Traffic Regulation,[6] the EU Long-term Residence Directive,[7] the Intra-corporate Transferees' Directive[8] and the Students' and Researchers' Directive;[9] finally, instruments that do not refer to circular migration but should be considered because they can contribute to rights-based circulation through provisions on flanking rights, thereby allowing for a migrant-led trajectory of circular migration: the Single Permit Directive,[10] the Family Reunification Directive[11] and the EU Long-term Residence Directive. The latter instrument must be understood as having a dual role. It contains a provision that according to the European Commission can facilitate circular migration for settled third-country nationals in the EU, as well as it provides the general rules on accessing the EU long-term residence status.[12]

This chapter focuses mainly on the five sectorial "first admissions" directives: the Seasonal Workers' Directive, the Blue Card Directive, the Intra-corporate Transferees' Directive, the Students' and Researchers' Directive and the Single Permit Directive. [13] It presents their most relevant provisions in the above-mentioned three categories and outlines their link to the EU's approach to circular migration. They are analysed horizontally in the policy areas that need to be addressed

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4 Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L 243/1.

5 Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L 81.

6 Regulation (EC) No. 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention [2006] OJ L 405.

7 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L 16.

8 Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L 157.

9 Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing [2016] OJ L 132.

10 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member [2011] OJ L 343

11 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251.

12 See Chapter 4 for more details in this regard.

13 The term "first admissions" Directives is borrowed from C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (Fifth edn.: Oxford University Press 2016), p. 494. In this text this term refers to the Seasonal Workers' Directive, Blue Card Directive, the Intra-corporate Transferees' Directive, the Students' and Researchers' Directive and the Single Permit Directive.

with regards to circular migration: entry and re-entry conditions, work authorisation, residence status, social security coordination, entry and residence for family members and the recognition of qualifications. The rest of the instruments are presented only in the relevant policy areas with the exception of the EU Long-term Residence Directive, which due its dual role is featured under two policy areas: entry and re-entry conditions and residence status.

After presenting the relevant provisions of the EU legal instruments in each of these respective policy areas, each section concludes with an assessment against the benchmarks promulgated in the analytical framework that was presented in Chapter 3 and Annex V. By identifying the instruments that are related to circular migration at EU level, this chapter serves as the basis for the implementation analysis at the national level in the subsequent chapters on Bulgaria and Poland.

5.2. Entry and re-entry conditions

This section presents the entry and re-entry conditions, as are required by the different EU legal instruments under the three categories outlined above: instruments aimed at the facilitation of circular migration; instruments that contain some circular migration elements and relevant instruments without explicit reference to circular migration. Firstly, it provides an overview of the admission conditions that are contained in each instrument. The requirements of the visa application process, the criteria for admission, such as sufficient resources, fees, as well as the rejection of applications are examined in order to provide a nuanced analysis of what is required for migrants who wish to start circulating. Secondly, this section examines re-entry conditions. If all of these conditions, either cumulatively or separately, prevent migrants from entering the EU, this would naturally undermine the effectiveness of circular migration policies. This would also mean less interest in circulation in general, and it could provide a possible motivation for overstaying or entry without any intention of returning to the country of origin.

The current study's analytical framework outlines several benchmarks in relation to entry and re-entry conditions. These include whether there is a possibility for facilitated personal travel, facilitated entry for temporary visits, circulation-friendly visa policies for third-country nationals and policies to encourage circular and return migration and reintegration into the country of origin (see Annex V). In addition, the benchmarks also cover the possibility to grant priority to seasonal workers who have been employed in the territory of a Member State

for a significant period of time, over other workers who seek admission to that Member State. Multiple entry visas and/or visa free regimes, as well as permits allowing periods of absence from the territory of the destination country for long–term residents have been identified as instruments that can lead to the implementation of these benchmarks on the basis of the conducted literature review.

5.2.1. Legal instruments aimed at the facilitation of circular migration

The Policy Plan on Legal Migration, which was presented by the European Commission in 2005, made an explicit link between the four specific sectorial directives that were proposed and the Commission's Communication on Migration and Development,[14] stressing that "arrangements on managed temporary and circular migration will be included in some of the specific instruments".[15] In 2007, the Commission proposed in its Communication on Circular Migration and Mobility Partnerships to "put in place an EU legislative framework that promotes circular migration" by listing the directives that could include measures to foster circular migration. The proposal for a Highly Skilled Migrants' Directive and the proposal for a Seasonal Workers' Directive were among the instruments considered for this purpose.[16]

Seasonal Workers' Directive[17]

The European Commission submitted a proposal for a Seasonal Workers' Directive to the Council and the European Parliament in July 2010, and after three and a half years of negotiations, the directive was eventually adopted in February 2014.[18] The explanatory memorandum to the proposal states that the aims of the Seasonal Workers' Directive are "to contribute to the implementation of the EU 2020 Strategy and to effective management of migration flows for the specific category of seasonal temporary migration" by setting out "fair and transparent

14 European Commission, Communication 'Migration and Development: Some concrete orientations', COM (2005) 390 final, Brussels, 1 September 2005.

15 European Commission, Policy Plan on Legal Migration, COM (2005) 669 final, Brussels, 21 December 2005, p. 11.

16 See Chapter 4 for more details in this regard.

17 Referred to in the footnotes as the SWD.

18 For a thorough overview of the negotiation process, see J. Fudge and P. H. Olsson, 'The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights', *European Journal of Migration and Law,* 16/4 (2014). See also A. Töttos, 'The Past, the Present and the Future of the Seasonal Workers Directive', *Pécs Journal of International and European Law,* I (2014); B. Fridriksdottir, *What Happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in Europan Union Law on Labour Migration* (PhD dissertation Radboud University Nijmegen, 2016).

rules for entry and residence" and at the same time providing for "incentives and safeguards to prevent a temporary stay from becoming permanent".[19] Circular migration is mentioned only twice in the explanatory memorandum. Firstly, the Commission links circular migration to the EU's development policy by claiming that the provisions on circular migration for seasonal workers between the EU and their countries of origin "would facilitate reliable inflows of remittances and transfer of skills and investment" and "is not expected to lead to brain drain in emerging or developing countries".[20]

Secondly, according to the detailed explanation of draft Article 12 of the proposal for a Seasonal Workers' Directive, the Commission stated that this provision aims to "promote circular migration of third-country national seasonal workers, that is, their movement between a third country and the EU for temporary stay and work in the latter".[21] Here, the European Commission employs the "triple win" rhetoric and states that "[s]uch type of migration will potentially benefit the country of origin, the EU host country and the seasonal worker him/herself". The impact assessment accompanying the proposal reaffirms that the Seasonal Workers' Directive should contribute to "mutually beneficial circular migration".[22] According to the proposal, "Member States have the choice of either issuing multi-seasonal permits or applying a facilitated procedure", where multi-seasonal permits cover up to three seasons and are therefore considered appropriate for sectors where the needs of the labour market remain stable over a period of time.[23]

During the negotiations in the Council and in the European Parliament, the concept of circular migration did not attract much attention. For instance, Spain was the only Member State to welcome the proposal "attaching particular importance

19 European Commission, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM (2010) 379, Brussels, 13.7.2010, p. 2.

20 European Commission, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM (2010) 379, Brussels, 13.7.2010, p. 3.

21 European Commission, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM (2010) 379, Brussels, 13.7.2010, p. 10.

22 European Commission, Commission Staff Working Document, Impact assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, SEC (2010) 887, Brussels, 13.07.2010, p. 17.

23 European Commission, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM (2010) 379, Brussels, 13.7.2010, p. 10.

to the issue of circular migration"[24] but stressed that "details should be clarified and public security should be safeguarded".[25] According to the opinion of the European Parliament's Committee on Women's Rights and Gender Equality, the "incentives offered for circular migration" were to be welcomed, but at the same time the Rapporteur also expressed "deep concern at the vulnerability of many seasonal workers, particularly women".[26]

In addition, the concept was not referred to in the opinion of the European Economic and Social Committee, but the said Committee endorsed the draft provision that facilitated re-entry.[27] By way of contrast, the Committee of the Regions welcomed the fact that the Seasonal Workers' Directive promotes circular migration "in a way which could make a positive contribution both to the Member States' labour markets and to development of the countries of origin". [28] It also recalled that this type of migration should not be seen as a substitute for permanent migration, and it noted that in order to facilitate circular migration and return, as well as to prevent irregular migration, "effective channels must be established".[29]

Nevertheless, draft Article 12 of the proposal (Article 16 of the Seasonal Workers' Directive), which provided for the facilitation of re-entry remained an "outstanding issue" until the end of the negotiations.[30] Several Member States expressed strong views in relation to this element of the directive. Austria made a reservation concerning this article, insofar as it was compulsory for the Member States.[31] Estonia, Lithuania, Italy, Portugal and Sweden opined that the first part

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24 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 5-6 September 2010, 13693/10, p. 2.

25 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 9-10 October 2010, 16772/10, p. 16.

26 European Parliament, Report on the proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, Rapporteur: Claude Moraes, 3 December 2013, PE464.960v03-00P, p.83.

27 European Economic and Social Committee, Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment COM(2010) 379 final - 2010/0210 (COD), Rapporteur: Ms Christa Schweng, 4 May 2011, SOC/392, p. 6, Para. 4.10.

28 Committee of the Regions, Opinion of the Committee of the Regions on 'Seasonal workers and intra-corporate transfer', Rapporteur: Graziano Ernesto, 31 March 2011, 2011/C 166/10, Paras. 6, 7 and 8.

29 Ibid.

30 Council of the European Union, Note from the Presidency to the Permanent Representatives Committee (Part II), 4 October 2013, 14150/13, p. 2.

31 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 9-10 October 2010, 16772/10, p. 15.

of the provision regulating "multi-seasonal worker permit" should be optional.[32] The Netherlands and Estonia claimed that it was difficult to predict future seasons and Austria, Germany and Italy raised concerns about the need to regularly assess the situation in the labour market. In addition, Sweden, the Netherlands and Greece insisted that the facilitation procedure in Article 12 (1) of the Seasonal Workers' Directive should be optional.[33] The European Commission, for its part, explained that this provision is "instrumental in ensuring circular migration and thus discouraging irregular overstays" and that "such provisions can be found in the national legislation of Spain, Italy and France".[34] Spain, on the other hand, expressed the wish to be able to adopt a more favourable positions in relation to Article 12 of the Seasonal Workers' Directive.[35]

Apart from Recital 17 of the Preamble to the proposal for a Seasonal Workers' Directive, which relates to Article 12 of the directive (Recital 34 of the Preamble to the Seasonal Workers' Directive),[36] this remained the only reference to circular migration in the directive. Austria put a scrutiny reservation on the Recital, because it regarded the reference to circular migration as being unclear.[37] Furthermore, Austria and Germany insisted that the promotion of circular migration referred to in the Recital should not be obligatory.[38] The position of the European Parliament, however, was that the re-entry facilitation should be mandatory, and this had to be reflected in both the Recital and in Article 12 of the Seasonal Workers' Directive.[39]

The final version of Recital 34 of the Preamble to the Seasonal Workers' Directive shows that the co-legislators were less ambitious than the European Commission when it came to the facilitation of circular migration. The Commission's initial

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32 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 9-10 October 2010, 16772/10, p. 16.

33 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 9-10 October 2010, 16772/10, p. 16.

34 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 9-10 October 2010, 16772/10, p. 16.

35 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 24 March 2011, 9160/11, p. 8.

36 Council of the European Union, Note from the Presidency to the Working Party on Integration, Migration and Expulsion, 14 September 2011, 13194/11, p. 6.

37 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 2 December 2011, 5611/12, p. 30.

38 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 2 December 2011, 5611/12, p. 30.

39 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, Rapporteur: Claude Moraes, 3 December 2013, PE464.960v03-00P, p. 14, p. 35. See also Council of the European Union, Note from the Presidency to the Permanent Representatives Committee (Part II) 25 October 2013, p. 23 and p. 93.

proposal which broadly stated that "circular migration of third country national seasonal workers should be promoted" was transformed during the negotiations into the obligation for Member States to foster circular migration only in relation to *bona-fide* seasonal workers:

> "Taking into account certain aspects of circular migration as well as the employment prospects of third-country seasonal workers beyond a single season and the interests of Union employers in being able to rely on a more stable and already trained workforce, the possibility of facilitated admission procedures should be provided for in respect of bona fide third-country nationals who have been admitted as seasonal workers in a Member State at least once within the previous five years, and who have always respected all criteria and conditions provided under this Directive for entry and stay in the Member State concerned". [40]

The circular migration of seasonal workers between the EU and their countries of origin is regarded as being of interest to the employers located in the EU as it enables them to rely on a stable and trained workforce, as well as providing better employment prospects for the workers themselves. The third "win" element for the country of origin from the "triple-win" is not explicitly mentioned in any of the Recitals, apart from the vague formulation under Recital 6 of the Preamble to the Seasonal Workers' Directive, which refers to the Stockholm Programme and the importance of "optimising the link between migration and development", which is in line with Commission's rhetoric in its early Communications.[41]

The adopted Seasonal Workers' Directive limits the discretion of Member States to impose admission criteria and requirements of stay on third-country nationals,[42] who are coming to exercise "activity dependent on the passing of the seasons".[43] The Seasonal Workers' Directive is designed to complement the existing multilateral and/or bilateral agreements that have been concluded between the EU, the EU and one or more Member States on one hand, and third countries on the other, when they provide more favourable provisions to third-country nationals.[44] On the basis of such agreements, Member States can continue to give priority to seasonal workers from certain countries. However, Article 4 of the Seasonal Workers'

40 Recital 34 of the Preamble to the SWD.
41 For more details in this regard, see Chapter 4.
42 Fudge and Olsson, 'The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights', p. 440.
43 Article 3 (c) of the SWD.
44 Article 4 of the SWD.

Directive does not allow Member States to maintain any other temporary migration schemes for the admission of seasonal workers, because this runs contrary to the objective of the Seasonal Workers' Directive in achieving a common approach to the admission of these types of workers.[45]

The key admission criteria are mandatory and exhaustive.[46] They are largely identical for seasonal workers staying for up to 90 days under Article 5 of the Seasonal Workers' Directive and for those whose stay exceeds 90 days under Article 6 of the Seasonal Workers' Directive.[47] Seasonal worker applications must be accompanied by a valid work contract or a binding job offer from an employer that is established in a Member State.[48] Furthermore, the application package must also contain a valid travel document, evidence that the migrant is or will be covered by health insurance, has adequate accommodation[49] and sufficient resources to maintain him/herself without having recourse to the social assistance system of that Member State.[50] Member States are required to verify that the third-country national does not present a risk of irregular immigration and intends to leave the country when the authorisation period expires.[51] Those migrants who pose a threat to public policy, public security or public health should not be admitted into the Member State.[52] Member States may require the payment of fees for the handling of applications, but the amount of those fees should not be disproportionate or excessive.[53]

An application can be rejected when the abovementioned admission conditions are not met or when the application documents have been fraudulently acquired, falsified, or tampered with.[54] In addition, Member States must reject applications by

45 Fudge and Olsson, 'The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights', p. 450. See also Töttos, 'The Past, the Present and the Future of the Seasonal Workers Directive', p. 58.

46 S. Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law* (Fourth Edition, Oxford European Union Law Library: Oxford University Press 2016), p. 385.

47 Fridriksdottir, *What Happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in Europan Union Law on Labour Migration,* p. 201.

48 Article 5 (1) (a) and Article 6 (1) (a) of the SWD.

49 See also Article 20 of the SWD.

50 Articles 5 and 6 of the SWD. For workers staying 90 days or less, Member States can use the Schengen border and visa rules to check some of these requirements, unless Member States do not apply them. In Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law* p. 385.

51 Articles 5 (5) and 6 (5) of the SWD. See also Recital 24 of Preamble to the SWD and the subsequent discussion in Section 1.1.4.

52 For a discussion, see Section 5.10 on the FRD.

53 Article 19 of the SWD.

54 Article 8 (1) of the SWD.

employers that have been sanctioned for undeclared work and/or illegal employment, whose business is or has been wound up under national insolvency laws or if no economic activity is taking place, or if the employer has been sanctioned or failed to comply with its obligations as per Article 17 of the Seasonal Workers' Directive. The other reasons for rejections are phrased as permissive provisions, setting out amongst other things the possibility for a labour market test to verify whether the particular position could be filled by nationals, other EU citizens, or other third-country nationals that are lawfully residing in the Member State in question.[55] Furthermore, Member States can also reject applications on the basis of Article 7 of the Seasonal Workers' Directive, which gives Member States the prerogative to determine the volume of admission of third-country nationals as per Article 79 (5) TFEU.[56]

The relationship between the Seasonal Workers' Directive and the EU visa rules was another issue of concern during the negotiations in the Council.[57] At a rather late stage in the negotiations it became clear that the admission rules had to take the Schengen *acquis* and the Visa code into consideration.[58] Thus, the Seasonal Workers' Directive had to accommodate six different authorisations for entry, stay and work depending on the length of stay of the seasonal worker and whether the Member State fully applies the Schengen *acquis*. When transposing the Seasonal Workers' Directive, Member States are required to choose one of the authorisations that are provided for under Article 12 of the Seasonal Workers' Directive.

For authorisations not exceeding 90 days, and without prejudice to the rules on the issuance of short-stay visas as per the Visa Code and in Council Regulation (EC) No. 1683/95, Member States can choose between a short-stay visa under Article 12 (1) (a) of the Seasonal Workers' Directive, a seasonal work permit for third-country nationals that are exempted from visa requirement in accordance with Annex II of Regulation (EC) No. 539/2001 under Article 12 (1) (c) of the Seasonal Workers' Directive, or the combination of a short-stay visa and a work permit under Article 12 (1) (b) of the Seasonal Workers' Directive. For authorisations exceeding 90 days, Member States have the following options

55 Article 8 (3) of the SWD.

56 See also Article 8 (4) of the SWD. For more details on the admission conditions, rejection and withdrawal grounds, see A. Wiesbrock, T. Jöst, and A. Desmond, 'Seasonal Workers Directive 2014/36/EU', in K. Hailbronner and D. Thym (eds.), *EU Immigration and Asylum Law. A Commentary* (Second edn.: C. H. Beck /Hart/ Nomos 2016), pp. 943-953.

57 Council of the European Union, Note from the Presidency to the Working Party on Integration, Migration and Expulsion, 17 November 2011, 16472/11, p. 3.

58 Fudge and Olsson, 'The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights', p. 451.

under Article 12 (2) of the Seasonal Workers' Directive: a long-stay visa, seasonal worker permit or a combination of both types of document, if the long-stay visa is required under national law for entering the territory of the Member State. When a visa is required, Member States must grant the third-country national every facility to obtain it.[59]

As was already mentioned above, the issue of whether the rules on the facilitation of re-entry should to be obligatory or not became the subject of disagreement between the Council and the Parliament during the course of negotiations. The agreed Article 16 of the Seasonal Workers' Directive introduced the possibility for a facilitated admission procedure to a Member State's labour market for seasonal migrants who have previously worked in the Member State, as a tool for the promotion of circular migration.[60] It is considered as one of the key provisions of the Seasonal Workers' Directive.[61] According to Article 16 (1) of the directive, Member States are obliged to "facilitate re-entry of third-country nationals who were admitted to that Member State as seasonal workers at least once within the previous five years, and who fully respected the conditions applicable to seasonal workers under this Directive during each of their stays". They are, furthermore, required to provide rules on facilitated (re)-entry, but the Member States are given a wide margin of discretion in doing so.[62]

Article 16 (2) of the Seasonal Workers' Directive contains possible facilitation measures: exemption for the seasonal workers from the requirement to submit certain documents, issuing several seasonal worker permits in a single administrative act, through an accelerated procedure for a seasonal worker permit or a long stay visa or priority in examining applications for admission as a seasonal worker.[63] This is a non-exhaustive list of examples and no minimum requirements are provided therein.[64] Therefore, the current provision does not demand any concrete commitments from the Member States and its effectiveness is, as a result, entirely dependent on the Member States.[65]

This section has demonstrated that the EU's circular migration approach towards seasonal workers resembles somewhat of a temporary migration scheme, which

59 Article 12 (7) of the SWD.
60 Recital 34 of the Preamble to the SWD.
61 Wiesbrock, Jöst, and Desmond, 'Seasonal Workers Directive 2014/36/EU', p. 960.
62 Articles 16 (1) and (2) of the SWD.
63 Article 16 (2) of the SWD.
64 Fudge and Olsson, 'The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights', p. 457. Wiesbrock, Jöst, and Desmond, 'Seasonal Workers Directive 2014/36/EU', p. 960.
65 Wiesbrock, Jöst, and Desmond, 'Seasonal Workers Directive 2014/36/EU', pp. 960- 961.

aims to keep their stay in the Member States as limited as possible, depending on the authorisation that they have obtained and which allows facilitated re-entry into the EU only for those *bona-fide* workers. It also shows that with regards to this instrument, the European Commission was the initiator and the main driving force behind the inclusion of an obligatory circular migration clause, alongside the European Parliament.

Blue Card Directive[66]

The European Commission submitted a proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment in October 2007 and the Council adopted the final text in May 2009. It is worth noting that the legal basis for the Blue Card Directive was Articles 63 (3)(a) and (4) TEC (now Articles 79 (2) (a) and (b) TFEU), which meant that the Blue Card Directive was adopted by the Council acting by qualified majority after obtaining the European Parliament's opinion in line with Article 251 TEC (now Article 294 TFEU).

The overall objective of the Blue Card Directive is to "attract and retain highly qualified third-country workers" in order to enhance the EU's competitiveness and economic growth by laying down the conditions for the entry and residence of workers and their family members and also by "by promoting their efficient allocation and re-allocation on the EU labour market".[67] The Commission's explanatory memorandum stresses that the proposal aims to achieve this objective "in a way which does not undermine the ability of developing countries to deliver basic social services and to progress towards the achievement of the Millennium Development Goals" and "[a]s such it will include measures to promote circular migration".[68]

Furthermore, the Blue Card Directive explicitly aims to "encourage geographical and circular migration" of highly-skilled third-country nationals.[69] To that end, the Commission's proposal and the adopted Blue Card Directive grant a number

66 Referred to in the footnotes as the BCD.

67 See European Commission, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM (2007) 637, Brussels, 23.10.2007, p. 2 See also Recitals 3 and 7 of the Preamble to the BCD.

68 European Commission, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM (2007) 637, Brussels, 23.10.2007, p. 2.

69 European Commission, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM (2007) 637, Brussels, 23.10.2007, p. 11, p. 16. See also Recitals 20, 21 and 22 of the Preamble to the BCD.

of privileges to these migrant workers by setting out, amongst other things, derogations to the EU Long-term Residence Directive and the Family Reunification Directive,[70] which are presented in more details in the subsequent subsections of this chapter. The facilitation of circular and temporary migration is also seen as one of the measures that "would minimise negative and maximise positive impacts of highly skilled immigration on developing countries".[71]

The impact assessment that was conducted by the Commission, which accompanies the proposal for the Blue Card Directive, noted that with some exceptions "no Member State seems to have put in place any scheme/facilitated procedure in order to promote circular and return migration" for highly-skilled third-country national workers. The Commission also stated in its impact assessment that such schemes would "help to maximize benefits for all interested parties": to foster the mobility of highly skilled third-country national workers, respond to labour needs in Member States, "while contributing, through eventual return, to the development of their countries of origin".[72] The preferred policy option that was outlined by the Commission in its impact assessment covered supporting measures, among which provisions aiming to "avoid negative effects on third countries, such as: encouraging circular migration by increasing flexibility of entry and readmission requirements (e.g. for the purpose of calculation of legal and continuous residence, the absence from the EU territory for a certain period would not be taken into account)".[73]

During the negotiations, the Council supported the promotion of circular migration along with limiting the permanent settlement of third-country nationals and maintaining Member States' power to decide on admission quotas for employment, which ultimately prevailed over the desire to attract highly-skilled third-

70 See draft Article 16 and Recital 17 of the Preamble to the Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM (2007) 637, Brussels, 23.10.2007.

71 Draft Recital 17 of the Preamble to the Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM (2007) 637, Brussels, 23.10.2007.

72 European Commission, Commission Staff Working Document, Impact assessment accompanying the Proposal for a Council Directive on the conditions of entry and residence of third country nationals for the purpose of highly qualified employment, SEC (2007) 1403, Brussels, 23.10.2007, p. 16.

73 European Commission, Commission Staff Working Document, Impact assessment accompanying the Proposal for a Council Directive on the conditions of entry and residence of third country nationals for the purpose of highly qualified employment, SEC (2007) 1403, Brussels, 23.10.2007, p. 68.

country workers to the EU.[74] The European Parliament welcomed the proposal.[75] However, its Committee on Development expressed the opinion that "although the EU recognizes the possible negative effects of highly skilled migration for developing countries, it argues that highly skilled migration will also benefit developing countries by reducing domestic labour market pressures and by sending remittances back home by migrants abroad". The Committee stressed that "[n] one of these arguments have proved to be completely right: it may be true that the Blue Card reduces the labour market pressures but it will attract workers from sectors already suffering of labour shortage inter alia education and health; at the same time, no consensus has been reached so far as to the real contribution of remittances in the development of social sectors as health or education in developing countries".[76]

By way of contrast to the Seasonal Workers' Directive, Article 3(4) of the Blue Card Directive does not limit the right of Member States to maintain or set up parallel national schemes for attracting highly-qualified migrants and to issue national permits other than Blue Cards. In fact, the Commission's implementation report revealed that more than half of the Member States opted for this possibility.[77] Peers has stressed that by applying such national rules, Member States are free to set higher or lower standards than the Blue Card Directive, or a combination of both.[78]

Furthermore, the Blue Card Directive allows the Member States to adopt more favourable conditions within its scope when they are provided in EU legislation and/or in bilateral and multilateral agreements between the Member States and

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74 S. Peers, 'The "Blue Card" Directive', in S. Peers et al. (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 2: EU Immigration Law* (Martinus Nijhoff Publishers, 2012), p. 324. For more details on the negotiations in general, see also K. Eisele, 'Why come here if I can go there? Assessing the 'Attractiveness' of the EU's Blue Card Directive for 'Highly Qualified' Immigrants', CEPS Paper in Liberty and Security in Europe, No. 60/October 2013, Brussels (2013); B. Friðriksdóttir, 'Negotiations on the Blue Card Directive in the Working party on Migration and Expulsion', in C. Grutters and T. Strik (eds.), *The Blue Card Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Centre for Migration Law, Radboud University, Nijmegen Wolf Legal Publishers, 2013).

75 Fridriksdottir, *What Happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in Europan Union Law on Labour Migration,* p. 101.

76 European Parliament, Report on the proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, Rapporteur: Ewa Klamt, PE409.459v03-00, 10 November 2008, p. 61.

77 European Commission, Communication on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, COM (2014) 287 final, Brussels, p. 4 and p. 13.

78 Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law* p. 374. See also Articles 3(4) and 4 (2) of the BCD.

third countries.[79] In addition, Member States can adopt or retain more favourable conditions in their national law with regard to, *inter alia*, labour market access,[80] temporary unemployment,[81] equal treatment,[82] family reunification[83] and absence from the territory of the EU for the sake of applying for a long-term residence status.[84] They also retain full control over the volume of admission of migrants for highly-qualified employment in line with Article 79 (5) TFEU, regardless of whether they apply from the territory of the Member State in question or from their third country.[85]

The scope of the Blue Card Directive is limited because it excludes a range of categories of migrants, such as seasonal workers, researchers and EU long-term residence status holders.[86]

In order to be eligible for an EU Blue Card, the applicant must be protected as an employee under national employment law and/or in accordance with the national practice of the respective Member State, irrespective of the legal relationship, for the purpose of exercising genuine and effective work for, or under the direction of, someone else; they must be remunerated and they must have the required adequate and specific competence, as proven by the possession of higher professional qualifications.[87] The notion of "higher professional qualifications" is defined by the Blue Card Directive as "qualifications attested by evidence of higher education qualifications" or in case of derogations in national law, "attested by at least five years of professional experience of a level comparable to higher education qualifications and which is relevant in the profession or sector specified in the work contract or binding job offer".[88] According to the Blue Card Directive,

79 Article 4 (1) of the BCD.
80 Articles 12 (1) and (2) of the BCD.
81 Article 13 of the BCD.
82 Article 14 of the BCD.
83 Article 15 of the BCD.
84 Article 16 (4) of the BCD.
85 Articles 6 and 8 of the BCD. (3); See also Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law,* pp. 374-375.
86 See Article 3 of the BCD. For a discussion, see Pieter Boeles et al., *European Migration Law* (2nd edn., Ius Communitatis Series, Volume 3: Intersentia 2014), p. 159.
87 Article 2 (b) of the BCD.
88 Article 2 (h) of the BCD. Poland is one of the Member States that opted to apply the derogation, whereby at least five years of relevant professional experience at a comparable level to higher education qualifications suffices as evidence of possessing a higher professional qualification. In European Commission, European Commission, Communication on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, COM (2014) 287 final, Brussels, p. 5

professional experience constitutes "the actual and lawful pursuit of the profession concerned".[89]

Unlike the Seasonal Workers' Directive,[90] the Blue Card applicant can be based either outside the territory of the Member State concerned or legally resident on its territory as the holder of a valid residence permit or national long-term visa.[91] However, Member States can derogate from the Blue Card Directive and apply either more favourable conditions - allowing eligible applicants to be already legally resident on their territory[92] - or less favourable conditions - limiting the eligible applications to the ones submitted from third countries only.[93] In both cases, the mandatory requirements for Blue Card applicants are to present: a valid work contract or a binding job offer for highly-qualified employment of at least one year,[94] proof that they fulfil the national legal requirements for EU citizens to exercise a regulated profession,[95] in relation to unregulated professions, documents proving "relevant higher professional qualifications in the occupation or sector",[96] a valid travel document, an application for a visa, a valid residence permit or a long-term visa depending on the national law requirements[97] and finally, proof of having sickness insurance or an application for such, if this is not covered by the work contract.[98]

In addition, the applicants should not be considered to pose a threat to public policy, public security or public health.[99] Member States may also require the Blue Card applicants to provide an address on their territory.[100] Another obligatory condition for Member States is to set a salary threshold of "at least 1.5 times the

89 Article 2 (i) of the BCD.
90 Article 2 (1) SWD.
91 Article 10 (2) of the BCD. Bulgaria is the only country where applications can only be made in its territory. In European Commission, European Commission, Communication on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, COM (2014) 287 final, Brussels, p. 8.
92 Article 10 (3) of the BCD.
93 Article 10 (4) of the BCD. Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law,* p. 378. Bulgaria is the only country that makes use of this less favourable derogation. In European Commission, European Commission, Communication on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, COM (2014) 287 final, Brussels.
94 Article 5 (1) (a) of the BCD.
95 Article 5 (1) (b) of the BCD.
96 Article 5 (1) (c) of the BCD.
97 Article 5 (1) (d) of the BCD.
98 Article 5 (1) (e) of the BCD.
99 Article 5 (1) (f) of the BCD.
100 Article 5 (2) of the BCD.

average gross annual salary in the Member State concerned", [101] which turned out to be the most controversial issue during the discussion of the proposed Blue Card Directive.[102]

The applicants who have fulfilled the abovementioned admission requirements and obtained a positive decision from the national authorities should be granted a Blue Card and "every facility to obtain the requisite visas".[103] Article 7 (2) of the Blue Card Directive stipulates a standard period of validity of the Blue Card, which is between one and four years, leaving greater flexibility to Member States than what was actually envisaged in the Commission's proposal.[104] If the contract covers less than this period, it can be issued or renewed for the duration of the work contract plus three months.

When the admission conditions are not met or when the documents presented have been "fraudulently acquired, or falsified or tampered with", the Member States are required to reject a Blue Card application.[105] The rest of the refusal grounds are optional provisions, giving wide discretion to the Member States. They may apply a labour market test during the initial application and during the first two years of legal employment as a Blue Card holder.[106] An application may also be rejected, if the volume of admission is exceeded in cases where the Member States has set a labour migration quota. [107] Further optional grounds for rejection can be based on ethical considerations, for example concerning the brain

101 Article 5 (3) of the BCD. They can, however, derogate from this article and apply a threshold of at least 1.2 times the average gross annual salary, when it comes to "employment in professions which are in particular need" and fall within group 1 "Professional, technical and related workers" and group 2 "Administrative and managerial workers" of the International Standard Classification of Occupations (ISCO) (Article 5 (5) of the BCD). For a full list of the professions, see: http://laborsta.ilo.org/applv8/data/isco68e.html (accessed 12 December 2017).

102 Fridriksdottir, *What Happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in Europan Union Law on Labour Migration,* p. 107.

103 Article 7 (1) of the BCD. Even though the directive does not explicitly oblige the national authorities to issue a Blue Card, on the basis of the CJEU case law by analogy with the admission of students, it is considered that such obligation does in fact exist. See Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law,* p. 376.

104 Fridriksdottir, *What Happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in Europan Union Law on Labour Migration,* p. 112.

105 Article 8 (1) of the BCD.

106 Article 8 (2) of the BCD. Both Bulgaria and Poland have chosen this option. In European Commission, European Commission, Communication on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, COM (2014) 287 final, Brussels, p. 7.

107 See Articles 8(3) and 6 of the BCD.

drain of qualified workers from the countries of origin, as well as due to sanctions of the employer for undeclared work and/or illegal employment.[108]

Even though the Blue Card Directive does not explicitly require Member States to renew Blue Card permits, nor does it rule this out as a requirement, given the many renewal references in the Blue Card Directive, the possibility to apply for the EU long-term residence status, as well as the implementation report for the Blue Card Directive,[109] it follows that they should be renewed, unless one of the grounds for non-renewal as per Article 9 of the Blue Card Directive applies.[110] This means that Member States cannot refuse to renew Blue Card permits on the basis of labour market test results, exceeded quotas or ethical recruitment considerations that are related to brain drain.[111]

During the validity period of the Blue Card, the Blue Card holders can enter, re-enter and stay in the territory of the Member State that issued the permit.[112] Furthermore, in line with one of the Blue Card Directive's objectives to encourage geographical and circular migration, Recital 20 of the Preamble to the Blue Card Directive states that "in order not to penalise geographically mobile highly qualified third-country workers who have not yet acquired the EC long-term residence status", derogations from the EU Long-term Residence Directive are provided therein.

This objective is detailed in Article 16 (3) of the Blue Card Directive, which stipulates that, by way of derogation, for the purposes of calculating the five year period of legal and continuous residence in the EU that is required for the EU long-term residence status,[113] periods of absence from the territory of the EU shall not interrupt this period if they are shorter than 12 consecutive months and do not exceed a total of 18 months within the required five year period.[114] Moreover, by way of derogation from Article 9 (1) (c) of the EU Long-term Residence Directive, Member States are required to extend the period of absence from the terri-

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108 Articles 8 (4) and (5) of the BCD. For withdrawal of refusal to renew a Blue Card, see Article 9 BCD and Pieter Boeles et al., *European Migration Law,* p. 162.

109 See European Commission, COM (2014) 287 final, Brussels, p.7.

110 Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law,* p. 378.

111 Ibid.

112 Article 7(4) of the BCD.

113 Derogation from the first subparagraph of Article 4(3) of the LTRD.

114 Article 16 (2) (a) of the BCD. On this aspect, see also R. Cholewinski, 'International Perspective on Highly Skilled Migration in Light of the Blue Card Directive and its Transposition in EU Member States', in C. Grutters and T. Strik (eds.), *The Blue Card Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Centre for Migration Law, Radboud University, Nijmegen Wolf Legal Publishers, 2013), p. 33.

tory of the EU, which is permitted for EU long-term residence status holder, to 24 consecutive months.[115] Yet, these derogations in relation to periods of absence may be restricted only to cases, where the third-country national in question can prove that he/she has been absent from the territory of the EU to exercise an economic activity in an employed or self-employed capacity, or to perform a voluntary service, or to study in his /her own country of origin.[116]

In addition, Recital 22 of the Preamble to the Blue Card Directive envisages the development of and application of mechanisms, guidelines and other tools to facilitate circular and temporary migration, as well as "other measures that would minimise negative and maximise positive impacts of highly skilled immigration on developing countries in order to turn 'brain drain' into 'brain gain'". There are only two provisions that touch upon this matter. The first is Article 3 (3) of the Blue Card Directive, which leaves discretion to the Member States to determine the professions that fall outside the directive's scope in order to ensure ethical recruitment in sectors suffering from a lack of personnel, by protecting human resources in the developing countries on the basis of agreements between the EU and/or the Member States and third countries.[117] In addition, Article 8 (4) of the Blue Card Directive lists, as a ground for refusing a Blue Card permit, the ethical recruitment in sectors that suffer from a lack of qualified workers in the countries of origin. According to the implementation report of the Blue Card Directive, only few Member States address brain drain and brain circulation and they do this mainly through national legislation, bilateral agreements and/or cooperation with countries of origin.[118]

In 2016, the European Commission concluded that the Blue Card Directive failed to achieve its objectives[119] and therefore proposed a recast, aiming to improve the ability of the EU to attract and retain highly-skilled migrant workers, and

115 Article 16 (4) of the BCD.

116 Article 16 (5) of the BCD. Bulgaria applies this restriction. In European Commission, Communication on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, COM (2014) 287 final, Brussels, p. 9

117 On the issue of ethical recruitment, see also Cholewinski, 'International Perspective on Highly Skilled Migration in Light of the Blue Card Directive and its Transposition in EU Member States', pp. 32-33.

118 European Commission, Communication on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, COM (2014) 287 final, Brussels, p. 5; European Migration Network, Attracting Highly Qualified and Qualified Third-Country Nationals: EMN Synthesis Report, 2013, p. 23.

119 Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM (2016) 378, final, Strasbourg, 7 June 2016, p. 2.

to "enhance their mobility and circulation between jobs *in* different Member States".[120] In July 2017, the Council agreed its mandate for negotiations on the draft directive[121] and the first trilogue meeting took place on 12 September 2017.[122] Currently, the proposal awaits Parliament's first reading.[123]

According to the impact assessment that was conducted by the European Commission, which accompanies the proposal, "circular migration is primarily considered as a spontaneous movement to achieve goals set within the migrant household",[124] which adds a new element to the definition at EU level,[125] namely the "spontaneous movement" that is linked to a migrant-led trajectory provided for highly-skilled migrant workers. The Commission's understanding is that this type of migration is "likely to support subsistence activities in areas of origin".[126] Therefore, the Blue Card Directive aims to give migrant workers the possibility "of longer 'time-outs', enabling them to return to their country of origin without being penalised with a loss of their residence permit, or expiration of the years of residence that count towards the right to long-term resident status".[127]

In line with this, the draft Recital 37 that was contained in the Commission's proposal reproduces the directive's objective that is contained in Recitals 20 and

120 Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM (2016) 378, p. 3 (emphasis added).

121 Council of the European Union, Note from the Presidency to the Permanent Representatives Committee, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment (First reading) - Mandate for negotiations with the European Parliament, 24 July 2017,10552/17.

122 For more details on the legislative process and the negotiations, see European Parliament, Martina Prpic, Briefing on EU Legislation in Progress, Revision of the Blue Card Directive, European Parliamentary Research Service, 12 December 2017, retrieved at http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603942/EPRS_BRI(2017)603942_EN.pdf (accessed 31 December 2017).

123 This section of the chapter is up to date as of 31 December 2017. See European Parliament, Legislative Observatory, Procedure file 2016/0176(COD), Conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, retrieved at http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/0176(COD)&l=en (accessed 31 December 2017).

124 European Commission, Commission Staff Working Document, Impact assessment accompanying the document Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment and repealing Directive 2009/50/EC, SWD (2016) 193 final, Part 6/6, Strasbourg, 7.6.2016, p. 30.

125 See Chapter 1 for more details in this regard.

126 European Commission, Commission Staff Working Document, Impact assessment accompanying the document Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment and repealing Directive 2009/50/EC, SWD (2016) 193 final, Part 6/6, Strasbourg, 7.6.2016, p.30.

127 European Commission, Commission Staff Working Document, Impact assessment accompanying the document Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment and repealing Directive 2009/50/EC, SWD (2016) 193 final, Part 6/6, Strasbourg, 7.6.2016, p.30.

21 of the Preamble to the Blue Card Directive with a view to facilitating circular migration between the EU and third countries through the same derogations that are present in the EU Long-term Residence Directive, concerning periods of absence before qualifying for the status and after obtaining it. However, in line with the modified objective of the Directive, the emphasis is placed on "encouraging their *continuous stay*", while also enabling mobility within the EU and circular migration.[128] It is clear that the type of circular migration that the Commission would like to foster with regards to highly-qualified workers is the circular migration of continuously staying or settled third-country nationals with EU long-term residence status, who are then given the opportunity to temporarily return to their countries of origin, while also enabling them to circulate before obtaining this status.

The European Parliament's LIBE Committee, however, considered that the derogations to the EU Long-term Residence Directive, providing for longer periods of absence after Blue Card holders have acquired the EU long-term residence status, would create "unequal treatment among third-country nationals who are long-term residents in the Member States" and concluded that the EU Long-term Residence Directive and the Blue Card Directive needed to be revised.[129] The respective amendments, however, were omitted from the Parliament's final report.[130] There is no discussion or referral to the concept of circular migration in the Parliament's draft and final reports, as well as in the opinion of the Economic and Social Committee.[131]

The proposed draft Recital 29 almost entirely repeats the substances of Recital 22 of the Preamble of the Blue Card Directive, refering to ethical recruitment policies, which need to be strengthened through, *inter alia*, the development of tools for the facilitation of circular and temporary migration so as to mitigate any

128 Recital 37 of the Preamble to the Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM (2016) 378.

129 European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Draft Report on the proposal for a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment (COM(2016)0378 – C8-0213/2016 – 2016/0176(COD)), Rapporteur: Claude Moraes, 26 January 2017, PE595.499v04-00, pp. 23, 61, 62.

130 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment (COM(2016)0378 – C8-0213/2016 – 2016/0176(COD)), Rapporteur: Claude Moraes, Committee on Civil Liberties, Justice and Home Affairs, PE595.499v05-00, 28 June 2017.

131 European Economic and Social Committee, Opinion on the Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment [COM(2016) 378 final - 2016/0176 (COD)], Rapporteur: Peter Clever, SOC/539, Brussels, 14 December 2016.

"brain drain" and turn it into "brain gain".[132] However, it remains unclear what type of circular migration measures this could encapsulate. In its impact assessment, the Commission admits that "policies specifically focused on circular migration are in their infancy and conclusions cannot be drawn concerning their impact".[133] On this point, the European Parliamentary Research Service added that this is precisely why a more in-depth analysis of the concept of circular migration is needed.[134] The Committee of the Regions proposed a similar recommendation in its opinion.[135] The three articles referring to ethical recruitment from the countries of origin in the Commission's proposal are identical to the ones contained in the directive [136] and do not shed any light in this regard. They have not been amended during the negotiations in the Council either.[137]

The changes in the recast directive that have been proposed by the Commission do not add much with regard to circular migration and re-entry conditions. However, they could ease entry conditions for highly-skilled third-country nationals, which are important with regards to the commencement of circular migration. In the proposal, the required length of the work contract is shortened from at least 12 months to at least six months compared to the current directive, which creates more flexibility for the employer and the employee.[138] Despite the lack of

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132 Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM (2016) 378, p. 26. The only difference is the addition that ethical recruitment should be consistent with the EU's commitment to the 2010 WHO Global Code of Practice on the International Recruitment of Health personnel, adopted with resolution WHA63.16 on 21 May 2010 by the 63rd World Health Assembly.

133 European Commission, Commission Staff Working Document, Impact assessment accompanying the document Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment and repealing Directive 2009/50/EC, SWD (2016) 193 final, Part 6/6, Strasbourg, 7.6.2016, p. 31.

134 K. Eisele, 'The New EU Blue Card DirectiveImpact Assessment (SWD(2016) 193, SWD(2016) 194 (summary)) of a Commission proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment (COM(2016) 378 final)', Briefing, Initial Apparisal of a European Commission Impact Assessment., (September 2016), p. 6.

135 European Committee of the Regions, Opinion on Legal Migration, CIVEX-VI/014, 8 December 2016, p. 8, Paras. 22-24.

136 Article 8 (4) and respectively Article 6 (4) of the BCD Recast Proposal, Article 3(3) in both the BCD and the Recast Proposal, Article 20 (1) second paragraph in the BCD and respectively Article 23 (2) third paragraph of the BCD Recast Proposal.

137 See Council of the European Union, Note from the Presidency to the Permanent Representatives Committee, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment (First reading) - Mandate for negotiations with the European Parliament, 24 July 2017,10552/17.

138 Article 5 (1) (a) of the Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM (2016) 378.

support from several Member States,[139] this provision has been adopted by the Council.[140] The draft Article 9 in the Commission's proposal requires Member States to allow applications from both within and outside the country, which was also supported by the Member States in the Council.[141] Moreover, in the Commission's proposal, the standard period of validity for the Blue Card permit is fixed at least 24 months, [142] which has been adopted by the Council.[143] According to the European Parliament, this period should be further extended to 36 months, in order to "offer a clear path for highly skilled third-country nationals to secure long-term residency".[144] This draft provision, combined with the reduced time required to obtain EU long-term residence from five to three years, will bring more security and could provide an incentive for individuals to circulate back and forth between their country of origin and the Member State where they reside. Despite the strong opinions of some Member States,[145] this provision was agreed upon during the Council negotiations.[146]

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139 At the time of writing this section, not all of the negotiation documents are publicly accessible, which does not allow for a thorough review. See for instance, Council of the European Union, Note from the General Secretariat of the Council to Delegations, 7 December 2016, 15275/16, p. 29, where Austria, Cyprus and Greece wanted to retain the period of 12 months that is provided for under the current Directive.

140 See Council of the European Union, Note from the Presidency to the Permanent Representatives Committee, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment (First reading) - Mandate for negotiations with the European Parliament, 24 July 2017,10552/17, p. 31.

141 Ibid, p. 47.

142 Article 8 (2) of the Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM (2016) 378.

143 Council of the European Union, Note from the Presidency to the Permanent Representatives Committee, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment (First reading) - Mandate for negotiations with the European Parliament, 24 July 2017,10552/17, p. 45.

144 European Parliament, Report on the proposal for a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment (COM(2016)0378 – C8-0213/2016 – 2016/0176(COD)), Rapporteur: Claude Moraes, Committee on Civil Liberties, Justice and Home Affairs, PE595.499v05-00, 28 June 2017, p. 54.

145 See for instance, Council of the European Union, Note from the General Secretariat of the Council to Delegations, 7 December 2016, 15275/16, p. 53, where Austria, the Czech Republic, Hungary, Lithuania and Poland had scrutiny reservations and opposed the three year period which according to them was too short for acquiring the EU long-term resident status as it did not give enough time for the person to become integrated, and thus there was no reason to diverge from the rules contained in Directive 2003/109/EC.

146 Council of the European Union, Note from the Presidency to the Permanent Representatives Committee, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment (First reading) - Mandate for negotiations with the European Parliament, 24 July 2017,10552/17, p. 60.

The EU's circular migration approach towards highly-skilled migrants differs quite substantially from the approach that has been adopted towards seasonal workers. The Commission wishes to attract Blue Card holders to settle and allow them flexibility to engage in a "spontaneous movement" between the EU and their countries of origin. This understanding of circular migration is new and is supported by the Commission insofar as it relates to highly-skilled migrant workers.

5.2.2. Instruments that contain some circular migration elements

5.2.2.1. EU Visa instruments

The EU visa legislation does not contain an explicit link to circular migration. However, it consists of different legal instruments, which under certain conditions, allow third-country nationals to enter the EU and remain on the territory of the Member States for a short period of time to either work or look for a job.[147] These instruments have the potential to facilitate short-term employment within the period of validity of the visa or the cross-border traffic permit.[148] In cases where the short-term employment or the circulation for the purposes of searching for a job lead to long-term employment, the admission and legal stay of the worker can be regularised through different instruments, on the basis of either EU or national legislation, depending on the facts of the individual case.[149] Furthermore, the Policy Plan on Legal Migration noted the importance of visa instruments and thus proposed "feasibility studies on long-term multi-entry visas and on how to effectively implement circular migration".[150] This section continues with a brief introduction to the EU visa legislation and a short presentation of each of its most relevant instruments.

The EU's visa policy developed out of the Schengen *acquis*, consisting of the Schengen Convention and the measures for its implementation, which were

147 K. Groenendijk, 'Equal Treatment of Workers from Third Countries: the Added value of the Single Permit Directive', in P. Minderhoud and T. Strik (eds.), *The Single Permit Directive: Central Themes, Problem Issues and Implementation in Selected Member States* (Wolf Legal Publishers, 2015), p. 23.

148 Ibid.

149 Ibid.

150 European Commission, Policy Plan on Legal Migration, COM (2005) 669 final, Brussels, 21 December 2005, p. 13.

initially outside the EU (back then EC) legal order.[151] The beginning of the Schengen system was established with the Schengen Agreement in 1985, followed by the Convention implementing the Schengen Agreement in 1990. The main idea behind this process was for the participating Member States to abolish the internal border controls between them, while simultaneously establishing an integrated system of external border control and common procedures on short-stay visas.[152] Following the entry into force of the Treaty of Amsterdam, the Schengen system was brought within the parameters of the EU legal order, as part of Title IV on "visas, asylum, immigration and other policies related to free movement of persons".[153] It began to operate in March 1995 and the Schengen area currently comprises 22 EU Member States and four non-EU Member States.[154]

As already mentioned in Chapter 4, since the Treaty of Amsterdam the EU was provided with the legal basis to start developing secondary legislation in this field, which is discussed below. Subsequently, and following the entry into force of the Treaty of Lisbon, the EU was given a mandate to adopt a common visa policy and other short-stay residence permits.[155] As Thym stresses, Article 77 (2) (a) read in conjunction with Article 79 (2) (a) TFEU on long-term permits allow for the "seamless regulation of immigration statuses" because it employs an open formulation of "short stay" rather than a fixed period of intended stay of no more than

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151 Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law,* p. 165; S. Peers, 'Institutional Framework', in S. Peers, E. Guild, and J. Tomkin (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 1: Visas and Border Controls* (Martinus Nijhoff Publishers, 2012), p. 18. For more details on the Schengen Border Code, see E. Guild, 'The Schengen Borders Code', in S. Peers, E. Guild, and J. Tomkin (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 1: Visas and Border Controls* (Martinus Nijhoff Publishers, 2012), pp. 33-95 and Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law,* pp. 115-130.

152 Amongst the other measures introduced as part of the Schengen system were also provisions on irregular migration and asylum, police and judicial cooperation, including the creation of a database: the Schengen Information System.

153 The integration of the Schengen *acquis* was done via a protocol attached to the Treaty. On the basis of specific legislative orders, the Council adopted decisions for the incorporation, among others e.g., Council Decision OJ 1999 L 17.

154 In 1995, the UK and Ireland opted out of the Schengen regime. The UK does not participate in the free internal and external border and visa policy, but it participates in judicial and police cooperation. Ireland and the UK can participate in some or all of the Schengen *acquis* provisions, so long as they receive the unanimous support of the Council. The Danish position in relation to the Schengen *acquis* is also complex. Even though it is part of the Schengen Agreement, it can choose whether or not to apply any new measures under Title V - area of freedom, security and justice - of the TFEU. See Protocol (No. 22) on the Position of Denmark art. 4, 2012 O.J. (C 326) 299. In addition, four countries that are not EU Member States joined the Schengen area: Iceland, Norway, Switzerland joined in 2008 and Liechtenstein joined in 2011. As of 2016, the Schengen area comprises all Member States from the last enlargement, except for Cyprus, Bulgaria and Romania and Croatia.

155 Article 77 (2) (a) of the Title V of the TFEU.

three months, which contrasts with versions of the Treaty.[156] This means that it is in the hands of the EU legislator to put a limit to the period of a few months covered by Article 77 TFEU. By way of contrast, Article 79 TFEU is the *lex specialis* for labour migration rules notwithstanding the duration of the stay, as is the case for the Seasonal Workers' Directive.[157]

The EU Visa Code[158]

Regulation (EC) No. 810/2009 establishing a Community Code on Visas (Visa Code)[159] aimed to further develop the common visa policy by consolidating the relevant provisions of the Convention implementing the Schengen Agreement of 14 June 1985[160] and the Common Consular Instructions[161] and by creating a "common corpus of legislation".[162] As Peers et al. stress, the code replaced "a myriad of prior rules governing the issue of visas by the EU Member States".[163] It also substituted several other EU measures and decisions by the Schengen Executive Committees, *inter alia*, in relation to extending or shortening the period of validity of the visa, airport transit visa and the freedom to travel with a long-term visa.[164] In line with the changes brought about by the Treaty of Lisbon, the Commission now has the power to implement the Visa Code on the basis of an "examination procedure" and it has adopted a number of the implementing measures.[165] Furthermore, a recast of the Visa Code is currently pending.

Article 2 of the Visa Code defines a visa as meaning "authorisation issued by a Member State" allowing for transit through or an intended stay on the territory of the Member States for a duration of no more than three months in any six-month period from the date of first entry into the territory of the Member States; or transit

156 D. Thym, 'Legal Framework for Entry and Border Controls', in K. Hailbronner and D. Thym (eds.), *EU Immigration and Asylum Law. A Commentary* (Second edn.: C. H. Beck /Hart/ Nomos 2016), p. 38.
157 Ibid.
158 Referred in the footnotes as the VC.
159 Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), OJ L 243, 15.9.2009.
160 Articles 9-17 of the Convention implementing the Schengen Agreement of 14 June 1985.
161 Common consular instructions on visas for the diplomatic missions and consular posts, OJ C 326, 22.12.2005.
162 Recital 3 of the Preamble to the VC.
163 S. Peers, 'The Visa Code', in S. Peers, E. Guild, and J. Tomkin (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 1: Visas and Border Controls*, p. 251.
164 See ibid., p. 253.
165 On the implementing measures, see S. Peers, 'Institutional Framework', in S. Peers, E. Guild, and J. Tomkin (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 1: Visas and Border Controls*., pp. 11-18.

through the international transit areas of airports in the Member States.[166] Applicants need to apply for a visa at the consulate of the competent Member State in whose jurisdiction they legally reside[167] or provide justification for lodging the application at a consulate in a country where they are legally present, but not resident in its jurisdiction.[168]

The Visa Code also stipulates the whole visa application process.[169] Applicants are required to lodge their visa applications no more than three months before the start of their intended visit, except for multiple-entry visa holders who may lodge the application six months in advance.[170] The Visa Code details all the documents that need to be submitted, including the standard application form,[171] a valid travel document,[172] biometric data (a photograph and ten fingerprints),[173] a non-exhaustive and non-harmonised list of supporting documents (including the possibility to require proof of sponsorship and/or private accommodation)[174] and travel medical insurance.[175] In addition, the Visa Code specifies the applicable fees – for the visa application and the service fee. The visa application fee amounts to 60 EUR and can be waived in certain circumstances, such as for example in the case of researchers coming from third countries and travelling for the purpose of carrying out scientific research.[176] The service fee, on the other hand, is charged when private companies are used to collect biometric data and the fee in this case shall not exceed half of the amount of the visa fee.[177]

Additionally, the Visa Code provides for the examination of the visa applications and the decisions taken, with the key issues being the substantive grounds for

166 These types of visa fall outside the scope of the present study and they will not be discussed here. For more details see Title II of the VC; Airport Transit Visas.
167 Article 6 (1) of the VC.
168 Article 6 (2) of the VC.
169 Articles 9-17 of the VC.
170 Article 9 (1) of the VC.
171 Article 11 of the VC.
172 Article 12 of the VC.
173 Article 13 of the VC.
174 According to Article 14 (1) of the VC, these are documents indicating the purpose of the journey; documents in relation to accommodation, or proof of sufficient means to cover his accommodation; documents indicating that the applicant possesses sufficient means of subsistence both for the duration of the intended stay and for the return to his country of origin or residence, or for the transit to a third country into which he is certain to be admitted, or that he is in a position to acquire such means lawfully, in accordance with Article 5 (now 6) of the Schengen Borders Code, see above; information enabling an assessment of the applicant's intention to leave the territory of the Member States before the expiry of the visa applied for. See also Annex II of the VC.
175 Article 15 of the VC.
176 Article 16 of the VC.
177 Article 17 and Article 43 of the VC.

deciding on the visa application.[178] According to Article 21 of the Visa Code, the criteria for admission that are set out in Article 5 of the Border Code apply and "particular consideration shall be given to assessing whether the applicant presents a risk of illegal immigration or a risk to the security of the Member States and whether the applicant intends to leave the territory of the Member States before the expiry of the visa applied for".

The CJEU ruled on the latter provision in the case of *Koushkaki*,[179] making it clear that this is the main substantive rule governing decisions on visa applications.[180] It stated that the obligation of the competent authorities of the Member States to issue a uniform visa is "subject to the condition that there is no reasonable doubt that the applicant intends to leave the territory of the Member States before the expiry of the visa applied for, in the light of the general situation in the applicant's country of residence and his individual characteristics, determined in the light of information provided by the applicant".[181] The CJEU also pointed out that Article 21(1) of the Visa Code sets out the factors which must be verified or taken into consideration before any decision on a visa application is taken and the rest of the provisions of this article concern the methods which the competent authorities must employ to verify the entry conditions and perform the necessary risk assessment, depending on the situation they are faced with.[182]

These methods include a Visa Information System (VIS) consultation in accordance with Articles 8 (2) and 15 of the VIS Regulation[183] and a check as to whether the applicants are in possession of medical insurance, if required. Furthermore, the consulate is obliged to verify that the applicant has not exceeded the maximum duration of authorised stay on the territory of the Member State, irrespective of possible stays authorised under a national long-stay visa or a residence permit issued by another Member State.[184] Finally, the Visa Code stipulates that a previous visa refusal shall not lead to the automatic refusal of a new application, which shall be assessed on the basis of all the available information.[185] The

178 S. Peers, 'The Visa Code', in S. Peers, E. Guild, and J. Tomkin (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 1: Visas and Border Controls*, p. 259.
179 Case C-84/12 - Rahmanian Koushkaki v. Bundesrepublik Deutschland, ECLI:EU:C:2013:862.
180 Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law,* p. 200.
181 Case C-84/12 - Rahmanian Koushkaki v. Bundesrepublik Deutschland, ECLI:EU:C:2013:862, Para. 73.
182 Ibid., Para. 28.
183 Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas [2008] OJ L 218.
184 Article 21 (4) of the VC.
185 Article 21 (9) of the VC.

CJEU in *Koushkaki* also confirmed that national authorities have wide discretion concerning the conditions for the application of the grounds for refusal set out in Article 32 of the Visa Code and the assessment of the relevant facts, in order to determine whether one of those grounds for refusal can be applied to the applicant. [186] The CJEU reconfirmed that point in the case of *Fahimian,* stating that national authorities enjoy wide discretion when assessing the relevant facts in order to determine whether public security grounds preclude the admission of a third-country national.[187]

Lastly, in the case of a positive decision to issue a visa, a visa may be issued for one, two or multiple entries, with the period of validity not exceeding five years.[188] A multiple-entry visa is issued with a period of validity between six months and five years, where the applicant proves the need or justifies the intention to travel frequently and/or regularly (due to occupational or family status) and proves his integrity and reliability, in particular the lawful use of previous uniform visas or visas with limited territorial validity, his economic situation in the country of origin and his genuine intention to leave the territory of the Member States before the expiry of the visa.[189]

Circular migration cannot commence without first obtaining a visa, unless the migrant is exempted from the visa obligation on the basis of his nationality. The EU visa policy is a central part of the EU's Integrated Border Management Strategy,[190] which aims to "reconcile security and freedom" by trying to achieve both: on the one hand facilitating legitimate and legal access to the EU and on the other, guaranteeing security, and counteracting irregular migration and cross-border crime.[191] As part of this strategy, visas have become one of the main EU instruments for pre-screening and the "extra-territorialisation" of immigration

186 Case C-84/12 - Rahmanian Koushkaki v. Bundesrepublik Deutschland, ECLI:EU:C:2013:862, Para. 63.

187 Case C-544/15 – Fahimian, ECLI:EU:C:2017:255, Para. 42.

188 Article 24 (1) of the VC.

189 Article 24 (2) of the VC.

190 Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, Brussels, 2 December 2009, Para. 5.1.

191 A. Meloni, 'EU Visa and Border Control Policies: What Roles for Security and Recirpocity?', in Didier Bigo, Elspeth Guild, and Sergio Carrera (eds.), *Foreigners, Refugees or Minorities? Rethinking People in the Context of Border Controls and Visas* (Ashgate, 2013), p. 155.

control.[192] Therefore, it is not surprising that visa applicants are subject to lengthy and cumbersome procedures. Firstly, applicants might face problems with access to visa procedures due to limited consular coverage.[193] Secondly, they need to submit a wide range of supporting documents, which differ from consulate to consulate because the Visa Code does not provide for an exhaustive list in Annex II thereof. This leads to visa shopping in order to find a consulate with a more liberal policy, time and financial losses, and it can lead to decreased motivation to visit a particular Schengen country.[194] Having wide discretion, the consulate may require additional documents, which can slow down the process of issuing the visa, and eventually filter the would-be-travellers in a different way.[195] All of this shows that it is not easy to initiate an individual circular migration project between the EU and a third country.

The previous chapter presented the visa facilitation and liberalisation instruments that were used as part of the GAMM and that can foster circular migration. In order to facilitate re-entry to the EU, the Visa Code provides a simple procedure for *bona-fide* travellers[196] and multiple-entry visas for regular or frequent travellers. In relation to the first category, Member States "may waive" the requirement for personal appearance,[197] as well as exempt the applicants from presenting one or more supporting documents.[198] However, these two options are completely under the discretion of the consulates and they are rarely applied in practice.[199] Therefore, the most important re-entry facilitation with regards to circular migration is the multiple-entry visa and the longer duration thereof.

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192 A. Meloni, 'EU Visa and Border Control Policies: What Roles for Security and Recirpocity?', in Didier Bigo, Elspeth Guild, and Sergio Carrera (eds.), *Foreigners, Refugees or Minorities? Rethinking People in the Context of Border Controls and Visas* (Ashgate, 2013), p. 156. See also V. Mitsilegas, 'Extraterritorial Immigration Control in the 21st Century: The Individual and the State Transformed', in Bernard Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control. Legal Challenges* (Martinus Nijhoff Publishers, 2010).

193 S. Mananashvili, 'Access to Europe in a Globalised World: Assessing the EU's Common Visa Policy in the light of the Stockholm Guidelines', *EUI Working Papers, RSCAS,* /2013/74 (2013), pp.2-3.

194 On the differences in implementation, see also ibid., p. 4.

195 For a street-level policy perspective, see F. Infantino, 'State-bound Visa Policies and Europeanized Practices. Comparing EU Visa Policy Implementation in Morocco', *Journal of Borderlands Studies* 31/2: Special Section: Multiplicity and multiplication: Transformations of border control (2016).

196 For the criteria, see Articles 24 (2) (b) and 26 (4) (b) of the VC.

197 Article 10 (2) of the VC.

198 Article 14 (6) of the VC.

199 Mananashvili, 'Access to Europe in a Globalised World: Assessing the EU's Common Visa Policy in the light of the Stockholm Guidelines', p. 5.

The Visa List Regulation

Another important instrument of the EU visa policy is Council Regulation (EC) No. 539/2001, which is referred to in Article 6 (b) of the Borders Code. Its aim is to determine the third countries whose nationals are subject to, or exempt from, visa requirements.[200] Article 1(1) of the Visa List Regulation sets out a list in Annex I thereof, providing a list of the nationals of third countries that are required to possess a visa when crossing the external borders of the Member States (referred to as the "negative list"). Additionally, the first subparagraph of the Article refers to Annex II, which specifies the nationals of third countries who are exempted from the requirement to obtain a visa for stays of no more than 90 days in any 180-day period (the so called "positive list"). The determination of countries to be included on the negative or, respectively, the positive list is done on the basis of a case-by-case assessment of a variety of criteria relating to irregular immigration, public policy and security, economic benefit, and the Union's external relations with the relevant third countries, including human rights and fundamental freedoms considerations, as well as the implications of regional coherence and reciprocity.[201]

Exempted from the visa requirement are, *inter alia*, the nationals of third countries listed in Annex I who are holders of a local border traffic card when these holders exercise their right within the context of the Local Border Traffic regime.[202] Yet, according to Article 4 (3) of the Visa List Regulation, Member States may impose a visa requirement on a person from a positive list state, if they are carrying out paid activity during their stay. There is no clarification in Regulation No. 539/2001 about the meaning of the "paid activity" exception. However, explana-

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200 Article 1 inserted by Regulation (EU) No. 509/2014 of the European Parliament and of the Council of 15 May 2014 amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 149, 20.5.2014.

201 For a detailed discussion in this regard, see S. Peers, 'The Visa Lists', in S. Peers, E. Guild, and J. Tomkin (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 1: Visas and Border Controls,* pp. 227-232.

202 Pursuant to Regulation (EC) No. 1931/2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention. Article 1 (2) also exempts school pupils, recognised refugees and stateless persons under certain conditions. Member States may exempt further categories, listed in Article 4 amended by Regulation (EU) No. 1289/2013 of the European Parliament and of the Council of 11 December 2013 amending Council Regulation (EC) No. 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement; Council Regulation (EC) No. 1932/2006 of 21 December 2006 amending Regulation (EC) No. 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

tions can be found in the EU's visa waiver treaties and more rules are contained in the Seasonal Workers' Directive.[203]

This regulation is of crucial importance for the facilitation of circular migration because for those third-country nationals whose country is on the positive list, it can allow "unrestricted" circulation across international borders without the need to complete the burdensome and bureaucratic procedure for obtaining a visa.

Regulation on local border traffic at external land borders

The Schengen Convention envisaged the adoption of rules in relation to local border traffic, but this opportunity was not used before the integration of the Schengen *acquis* in the EU legal order.[204] The Schengen Border Code included the adoption of separate rules in this regard, replacing the repealed provisions of the Schengen Convention.[205] On this basis, the Commission adopted a proposal for rules on local border traffic already in 2003,[206] but due to certain institutional hurdles – most notably, the need for unanimity in the Council – the proposal was adopted in 2005 with the extension of qualified majority voting to border issues.[207]

The local border traffic regime constitutes a derogation from the general rules governing the border control of persons crossing the external borders of the Member States of the European Union and it is regulated by the Schengen Borders Code.[208] Furthermore, the 2006 amendments to the Visa List Regulation allow exemptions from the visa obligation to border residents who benefit from the local border traffic regime that was introduced by the regulation.[209] The Local Border Traffic Regulation provides for the establishment of a special regime on the basis of a local border traffic permit and bilateral agreements with neighbouring third countries, which Member States are authorised to conclude in order to implement the established regime.[210]

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203 Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law,* p. 192.

204 S. Peers, 'Other Border Control Measures', in S. Peers, E. Guild, and J. Tomkin (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 1: Visas and Border Controls*, p. 207.

205 Article 35 (Article 40 in the consolidated version) of the Schengen Borders Code.

206 COM (2003) 502, 14 August 2003.

207 Regulation (EC) No. 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention [2006] OJ L 405.

208 Recital 3 of the Preamble to the LBTR.

209 Council Regulation (EC) No. 1932/2006 of 21 December 2006 amending Regulation (EC) No 539/2012. See also Recital 6 of the Preamble to the LBTR.

210 Article 1 of the LBTR. See also Article 13 of the LBTR.

According to the Local Border Traffic Regulation, a "border area" is defined as an area that extends up to 30 kilometres from the borderline; but in order to include an entire border district, this limit can be extended by up to 50 kilometres from the border line.[211] In addition, "local border traffic" means the regular crossing of an external land border for social, family, cultural or substantiated economic reasons by border residents in order to stay in a border area.[212] However, Article 2 of the Local Border Traffic Regulation stresses that the regime shall not affect the EU and national laws applicable to third-country nationals with regard to long-term stays and access, as well as the exercise of economic activities.[213] In order to qualify as a border resident, a person should be lawfully resident in the border area of a country neighbouring a Member State for a period of at least one year. In "exceptional and duly justified cases", this period can be reduced.[214]

In order to make use of the local border traffic regime, border residents need to meet fewer conditions than the regular short-term visa holders and they do not require a visa.[215] They can stay in the border area for up to three months (this duration varies according to the different bilateral agreement) and this period is not limited by the 180 day period that is applicable to the rest of the short-term visa holders.[216] The validity of the permit, depending on the applicable bilateral agreement, can last for a minimum of one year and for a maximum of five years.[217] So far, several bilateral agreements with Eastern Partnership countries and Russia have been concluded (see Table 5.1.).[218]

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211 Article 3 (2) of the LBTR.
212 Article 3 (3) of the LBTR.
213 See point 24 of Case C-254/11 - Oskar Shomodi, ECLI:EU:C:2013:182.
214 Article 3 (6) of the LBTR.
215 See Article 4 of the LBTR.
216 S. Peers, 'Other Border Control Measures', in S. Peers, E. Guild, and J. Tomkin (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 1: Visas and Border Controls*, p. 210.
217 Article 10 of the LBTR.
218 For more details on implementation see European Commission, Report from the Commission to the European Parliament and the Council on the implementation and functioning of the local border traffic regime introduced by Regulation (EC) No. 1931/2006 of the European Parliament and of the Council laying down rules on local border traffic at the external land borders of the Member States, COM/2009/0383 final, Brussels; Second report on the implementation and functioning of the local border traffic regime set up by Regulation No. 1931/2006, COM(2011) 47 final, Brussels; Report on the implementation and functioning of Regulation (EU) No. 1342/2011 of the European Parliament and of the Council amending Regulation (EC) No. 1931/2006 as regards the inclusion of the Kaliningrad oblast and certain Polish administrative districts in the eligible border area and on the bilateral agreement concluded thereof between Poland and the Russian Federation, COM/2014/074 final, Brussels.

Ukraine	Belarus	Moldova	Russia
Hungary-Ukraine (entry into force: January 2008)	Latvia-Belarus (entry into force: 1 December 2011)	Romania-Moldova (entry into force: October 2010)	Poland-Russian Federation (entry into force: July 2012; suspended)
Slovakia-Ukraine (entry into force: September 2008)			
Poland-Ukraine (entry into force: July 2009)			Latvia-Russian Federation (entry into force: 6 June 2013)
Romania- Ukraine (entry into force: 14 May 2015)			

Table 5.1. List of bilateral agreements between EU MS on one hand and Eastern Partnership countries and Russia on the other, notified by Member States to the European Commission. Source: DG Home.[219]

The local border traffic rules have the effect of simplifying border crossings for many people in the neighbouring countries of the EU, who as a result of the latest enlargements and the full application of the *Schengen acquis*, were left outside the external border of the EU and thus became subject to visa requirements.[220] Thus, it has contributed to enhancing economic, cultural and personal links at the individual level, as well as maintaining political relationships between the EU and its neighbouring countries. However, the Local Border Traffic Regulation does not affect the EU and the national rules with regards to long-term stays and the exercise of economic activities, and thus it cannot be regarded as directly contributing to the facilitation of circular migration.[221]

5.2.2.2. Legal Migration Directives

EU Long-term Residence Directive[222]

The EU Long-term Residence Directive was adopted in 2003 and sets out the terms and conditions for granting and withdrawing the EU long-term residence status for legally residing third-country nationals, as well as the rights that are conferred by this status, including free movement and residence rights in other Member States.[223] The aim of the EU Long-term Residence Directive is to inte-

219 Retrieved at: *http://ec.europa.eu/dgs/home*-affairs/e-library/documents/policies/borders-and-visas/schengen/docs/notifications_under_article_19_en.pdf (accessed 30 November 2017).
220 Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law,* p. 146.
221 Article 2 of the LBTR.
222 Referred in the footnotes as the LTRD. More relevant information on the directive is presented under Section 5.6. Residence Status.
223 Article 1 of the LTRD.

grate third-country nationals, who are long-term residents, which is stated in its Preamble and has been subsequently confirmed throughout the case law of the CJEU.[224]

In 2005, the Policy Plan on Legal Migration identified the EU Long-term Residence Directive as an instrument offering "interesting possibilities, such as the possibility for Member States to allow returning migrants to retain this status for longer than the one year period provided for in Article 9".[225] In line with that aim, it envisaged an analysis of the transposition and implementation of Article 9 of the EU Long-term Residence Directive by the Member States with a view to fostering and facilitating the circular migration of third-country nationals that are settled in the EU.[226] The Communication on Circular Migration and Mobility Partnerships reiterated that the Commission "may in due course consider proposing adjustments to a number of existing legislative instruments in order to promote circular migration", including extending the allowed period of absence from the territory of the EU from 12 consecutive months to two or three years, after which the long-term status could be withdrawn.[227]

According to the EU Long-term Residence Directive, this status can be withdrawn or lost in the event of absence from the territory of the EU for a period of 12 consecutive months, unless longer periods are permitted because of specific or exceptional reasons.[228] The Commission cites the development of a project in the

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224 See for instance, Case C-571/10 - Kamberaj, ECLI:EU:C:2012:233, Para. 90; Case C-508/10 - Commission v. Netherlands, ECLI:EU:C:2012:243, Para. 66; Case C-502/10 - Singh, ECLI:EU:C:2012:636, Para. 45. For more details, see Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law,* p. 422.

225 European Commission (2005), Policy Plan on Legal Migration, COM (2005) 669 final, Brussels, 21 December 2005, p.10.

226 European Commission (2005), Policy Plan on Legal Migration, COM (2005) 669 final, Brussels, 21 December 2005, p.13 and European Commission, Communication on circular migration and mobility partnerships between the European Union and third countries, COM (2007) 248 final, Brussels, 16 May 2007, p. 9. It is not clear whether the commissioned study of the EMN covered this envisaged analysis or not. However, the specifications for the EMN study state that it aims at "responding to requests from the Council through Council Conclusions and the Stockholm Programme regarding further exploration and development of circular migration as a part of EU migration policy". Apart from this study and the Implementation report of the Commission from 2011, there is no other publicly accessible analysis on this topic. An *ad hoc* "update" of the EMN has been provided on the initiative of Sweden, retrieved at: https://www.udi.no/globalassets/global/european-migration-network_i/ad-hoc-queries/se-emn-ncp-ad-hoc-query-on-policies-for-circular-migration_open-compilation_2014-08-12.pdf (accessed 12 April 2017).

227 European Commission, Communication on circular migration and mobility partnerships between the European Union and third countries, COM (2007) 248 final, Brussels, 16 May 2007, p. 10.

228 Article 9 (1) (c) of the LTRD.

country of origin as an example of such a specific exceptional reason.[229] The Report on the implementation of the directive shows that only some Member States have allowed longer periods of absence: Austria, Belgium, Czech Republic, Finland, Luxembourg, Malta, Portugal and Slovenia.[230] For instance, in 2014 Sweden extended the permitted period of absence outside its territory to two years, as a result of legislative changes in Sweden aiming at encouraging circular migration and promoting the positive impacts of migration on development.[231]

The Recast Students' and Researchers' Directive[232]

The Researchers' Directive was adopted in 2005 and it did not include any reference to circular migration. Subsequently, the Communication on Circular Migration and Mobility Partnerships identified it as one of the legislative instruments that could be adjusted with a view to promoting circular migration. [233] The possible amendments that were envisaged back then included: the introduction of multiple-entry residence permits, thereby allowing the researchers to be absent from EU territory for long periods without losing their permit, an amendment to the Researchers' Directive's optional clause, providing simplified or fast-track admission procedures for persons who have formerly worked as researchers or studied in the EU, and turning this into a right for such persons to access to speedier procedures, provided that they subsequently return to their home country at the end of their permit; allowing for easier admission as a researcher (with fewer conditions attached) to non-EU nationals who have previously been admitted as students and who, after their studies, duly returned to their country of origin. [234]

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229 European Commission, Report on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, Brussels, COM (2011) 585 final, 28 September 2011, p. 5.

230 European Commission, Report on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, Brussels, COM (2011) 585 final, 28 September 2011, p. 5. See Bertelsmann Stiftung, "A Fair Deal on Talent – Fostering Just Migration Governance. Lessons from Around the Globe" (2015).

231 See European Migration Network, 'Temporary and Circular Migration: empirical evidence, current policy practice and future options in EU Member States. Report on Sweden', Prepared by Migrationsverkert, (2011), p. 45. See Bertelsmann Stiftung, "A Fair Deal on Talent – Fostering Just Migration Governance. Lessons from Around the Globe" (2015). See also the *ad hoc* query of the EMN provided on the initiative of Sweden, retrieved at https://www.udi.no/globalassets/global/european-migration-network_i/ad-hoc-queries/se-emn-ncp-ad-hoc-query-on-policies-for-circular-migration_open-compilation_2014-08-12.pdf (accessed 12 April 2017).

232 Referred to in the footnotes as the SRD.

233 See Chapter 4, section 4.3.4 for more details in this regard.

234 European Commission, Communication on circular migration and mobility partnerships between the European Union and third countries, COM (2007) 248 final, Brussels, 16 May 2007, p. 10.

The Researchers' Directive was ultimately not amended to reflect any of these proposed measures, and its only indirect link with circular migration was through the former Recital 6 of the Preamble to the directive, stating that its implementation should not encourage brain drain from developing countries and that the movement and re-integration of researchers should be based on partnership with the countries of origin.[235] However, the Researchers' Directive did not provide any provisions in this regard.

On the basis of the assessment of the implementation of the Researchers' Directive[236] and the Students' Directive,[237] which was considered to be unsatisfactory, the Commission proposed an overhaul to the framework in 2013. The proposal for a recast that would merge the two directives aimed to overcome weaknesses, primarily in relation to admission procedures, rights and procedural safeguards and at the same time to reflect the new circumstances and policy contexts.[238] Even though it was initiated in 2013, neither the proposal nor its accompanying documents explicitly mention the term "circular migration". The explanatory memorandum contained, however, a reference to "brain circulation", stressing that this would be encouraged by allowing third-country nationals to acquire skills and knowledge through a period of training, which would benefit both sending and receiving countries.[239] Furthermore, the overall objective of the recast directive was formulated as "to support social, cultural and economic relationships between the EU and third countries, *foster the transfer of skills and know-how* and promote competitiveness while, at the same time, provide for safeguards ensuring fair treatment of these groups of third-country nationals".[240]

In addition, both the proposal and the adopted Directive 2016/801 stress that "fostering people-to-people contacts and mobility" is an important element of the European Neighbourhood Policy and will contribute to the GAMM and its

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235 Currently Recital 13 of the Preamble to the SRD.

236 European Commission, Report on the application of Directive 2005/71/EC on a specific procedure for admitting third- country nationals for the purposes of scientific research, 20 December 2011, COM (2011) 901 final.

237 European Commission, Report on the application of Directive 2004/114/EC on the conditions of admission of third- country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, 28 September 2011, COM (2011) 587 final.

238 European Commission, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing [Recast], COM (2013) 0151 final, p. 2.

239 SRD Recast Proposal, p. 3. This is not part of the final text of the directive.

240 SRD Recast Proposal, p. 2, emphasis added.

Mobility Partnerships[241] by potentially providing measures for promoting the mobility of the categories of migrants that are covered by the scope of the directive.[242] Recital 6 of the Preamble to the Researchers' Directive was retained as Recital 13 of the Preamble to the Students' and Researchers' Directive, but it was slightly modified by omitting the reference to movement of researchers on the basis of partnerships with countries of origin. Therefore, notwithstanding the lack of an explicit reference to circular migration in the final text of the adopted Students' and Researchers' Directive, it is important to analyse whether it contains circular migration elements. To do this, it is necessary to focus on the provisions concerning researchers because they are generally a very mobile group of professionals, and because skill-transfer and cross-border work is often part of their every day job.

The Students' and Researchers' Directive regulates the entry, residence and rights of researchers for periods exceeding 90 days, and their family members where applicable.[243] The term "Researcher" is defined as "a third-country national who holds a doctoral degree or an appropriate higher education qualification which gives that third-country national access to doctoral programmes, who is selected by a research organisation and admitted to the territory of a Member State for carrying out a research activity for which such qualification is normally required".[244] According to the Students' and Researchers' Directive, the term "research" means "creative work undertaken on a systematic basis in order to increase the stock of knowledge, including knowledge of man, culture and society, and the use of this stock of knowledge to devise new applications".[245] Falling outside the scope of the Students' and Researchers' Directive are, *inter alia*, Blue Card holders, EU long-term residence status holders and intra-corporate transferees.[246] The Students' and Researchers' Directive allows for more favourable provisions to be adopted in agreements between the EU and its Member States with third countries.[247]

Applications can be submitted either when the applicant is outside the territory of the Member State where he wants to be admitted, and also from the territory of the Member State where he resides on the basis of a valid residence permit or

241 Recital 6 of the Preamble to the SRD Recast Proposal and Recital 13 of the Preamble to the SRD.
242 SRD Recast Proposal, p. 3.
243 Article 1 of the SRD.
244 Article 3 (2) of the SRD.
245 Article 3 (9) of the SRD.
246 For full list, see Article 2 of the SRD.
247 Article 4 (1) of the SRD.

long-term visa.[248] In order to be admitted as a researcher, the applicant needs to meet both general and specific conditions. The general obligatory conditions that are relevant for researchers are for them to present: a valid travel document, a visa or a visa application if required, proof that the applicant has or has applied for sickness insurance for all risks covered for nationals in the Member State and which is valid for the duration of the whole stay and an evidence that a handling application fee has been paid, if this is applicable.[249] In addition, Member States are obliged to ask for evidence of "sufficient resources", which is assessed on a case-by-case basis.[250] Finally, applicants that pose a threat to public policy, public security or public health should not be admitted.[251]

Among the specific conditions that researchers need to meet is the requirement to present a hosting agreement.[252] This agreement needs to be agreed between the researcher and the hosting institution and should contain: the title, the purpose or the research area, a commitment by both the applicant and the host institution that the research will be completed, a start and end date and/or estimated duration of the activity and intra-EU mobility plans.[253] Alongside those obligatory conditions, Member States have discretion to require additional admission provisions in this respect.[254]

Many of the grounds for rejection are optional.[255] The mandatory ones cover cases when the general and specific conditions are not met, when the presented documents are "fraudulently acquired, or falsified, or tampered with", and when a particular Member State only allows admission through an approved host entity and the host entity is not approved.[256] Amongst the optional requirements, the Member States can impose a labour market test when the applicant enters into an employment relationship with the host institution and can reject the application if the position can be filled by another national, EU citizen or lawfully residing third-country national.[257] The same provision can also be applied in cases of renewal of

248 Article 7 (4) of the SRD. For provisional derogation, see the second paragraph of this article.
249 Articles (7) (a), (c), (d) of the SRD.
250 Article 7 (e) of the SRD.
251 Article 6 (6) of the SRD. The optional conditions include the provision of an address on the territory of the Member State in Article 7 (2) of the SRD and setting a reference amount for the "sufficient resources" requirement in Article 7 (2) of the SRD.
252 Or a contract containing all these items, if Member States decide to opt for this. See Article 10 (1) of the SRD.
253 Article 10 (2) of the SRD.
254 See Articles 10 (3), (7) and (8) of the SRD.
255 See Articles 20 (2) and 21 (2) of the SRD.
256 For the rules on approval of research organisations, see Article 9 of the SRD.
257 Article 20 (3) of the SRD.

authorisation, except when the researcher continues the employment relationship with the same host entity.[258]

Despite the reference to "brain circulation" and the objective of fostering the transfer of skills, as well the reference to mobility as an important element of the GAMM, the Students' and Researchers' Directive does not contain any provisions on the facilitation of re-entry or easier access to continuous residence with the possibility for geographical mobility, as is the case in the Blue Card Directive. Therefore it remains unclear what the above references actually amount to in practice.[259] Without a special provision allowing for circularity, the researchers can only rely on the available visa facilitation instruments, which can in turn support their individual circular migration projects. However, as was already stated, researchers are a mobile group of migrants and therefore it makes sense to also assess the Students' and Researchers' Directive against the background of the other policy areas that are considered in the analysis of circular migration issues, and to see to what extent this group of migrants can benefit from rights-based circularity, notwithstanding the lack of any references to this concept in the text of the Students' and Researchers' Directive.

Intra-corporate Transferees' Directive[260]

The Intra-corporate Transferees' Directive was one of the directives listed by the European Commission in the 2005 Policy Plan on Legal Migration as being among one of the future instruments that should contain circular and temporary migration measures,[261] which in 2007 was reconfirmed in the Communication on Circular Migration and Mobility Partnerships.[262] Even though the Intra-corporate Transferees Directive was negotiated during the same period as the Seasonal Workers' Directive, neither the Commission's proposal and its explanatory memorandum, nor the adopted Intra-corporate Transferees' Directive actually mentions the term "circular migration".[263] Instead, the Intra-corporate Transferees' Directive

258 Article 21 (5) of the SRD.

259 The documents from the Council negotiations do not shed light on this aspect either.

260 Referred in the footnotes as the ICTD.

261 European Commission (2005), Policy Plan on Legal Migration, COM (2005) 669 final, Brussels, 21 December 2005, p.11.

262 European Commission, Communication on circular migration and mobility partnerships between the European Union and third countries, COM (2007) 248 final, Brussels, 16 May 2007, p. 16.

263 The Impact assessment mentions it several times under the different policy options with regards to impacts on third countries and the questionnaire to stakeholders. See European Commission, Commission Staff Working Document Impact Assessment Accompanying the Proposal for a Directive of the European Parliament and the Council on conditions of entry and residence of third country nationals in the framework of an intra-corporate transfer, SEC (2010) 884, Brussels, 13.07.2010, p. 31, p. 92.

refers to "temporary migration". Recital 7 of the Preamble to the Intra-corporate Transferees' Directive states that the rules provided for in the directive "may also benefit the migrants' countries of origin as this temporary migration may, under its well-established rules, foster transfers of skills, knowledge, technology and know-how".

The Intra-corporate Transferees' Directive is considered in this chapter because during the discussions in the Council's Working Party on Integration, Migration and Expulsion, a new provision was added to the text of the directive, which makes it possible for ICTs to return for a subsequent transfer, at the end of the maximum period of stay that is permitted under the directive, which could transform the temporary migration into circular migration. The amendment was a result of Germany's inquiry "as to whether a TCN could submit a new application and return to the EU after a 3-year stay" and Lithuania's proposal for the following addition: "Member States may determine the minimum period after the end of validity of the intra-corporate transferee permit after which a new intra-corporate transferee permit may be issued to the same person".[264] This led to an amendment of draft Article 10A, providing that "Member States may require a certain period of up to 3 years to pass between the end of a transfer and another application concerning the same third-country national for the purposes of this Directive in the same member States".[265] Despite the Hungarian opposition to this amendment on the basis that it would be difficult to implement in practice, the draft article was nevertheless retained.[266] The European Parliament suggested an amendment to this draft provision during the trialogue meeting, stating that "Member States shall require 6 months to pass between the end of a transfer and another application concerning the same third-country national for the purposes of this Directive".[267] The Council reworded this provision into a "*may*" clause, which was adopted as Article 12 of the Intra-corporate Transferees' Directive.[268] Thus, this time it was the Council, with the support of Parliament, that introduced an element of circular migration into this directive.

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264 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 5 April 2011, 8485/11, p. 24.

265 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 12 January 2012, 5128/12, p. 35.

266 Council of the European Union, Outcome of Proceedings of Permanent Representatives Committee, 6 June 2012, 10618, p. 34.

267 Council of the European Union, Note from Presidency to Counselors (Justice and Home Affairs), 21 November 2013, 16578/13, p. 88.

268 Council of the European Union, Note from Presidency to Counselors (Justice and Home Affairs), 21 November 2013, 16578/13, p. 88.

The Intra-corporate Transferees' Directive lays down the conditions of entry and residence in the territory of the Member States, and the rights of third-country nationals and their family members in the framework of an intra-corporate transfer, as well as their secondary transfers to another Member State.[269] An intra-corporate transferee is defined as a third-country national who resides outside the EU at the time of application and who applies for an intra-corporate transferee permit and who is subject to an intra-corporate transfer. The notion of "transfer" refers to a temporary secondment for occupational or training purposes with a group of undertakings established both outside the EU and in one or more Member States.[270]

This Intra-corporate Transferees' Directive includes three types of ICTs: managers, specialist and trainees.[271] Excluded from the directive's scope are: researchers, posted workers, persons enjoying free movement rights under agreements between the EU and third countries, self-employed persons, workers hired through agencies, students and those who are undergoing a short-term supervised practical training as part of their studies.[272] Member States are not free to operate separate national rules on ICTs, which was one of the outstanding issues that was present throughout the negotiation of the Intra-corporate Transferees' Directive.[273] However, Article 2 (3) of the Intra-corporate Transferees' Directive gives Member States the right to issue residence permits for any purpose of employment for third-country nationals who fall outside the scope of this directive, meaning persons other than managers, specialist and trainees.

At the time of the application, the third-country national must be residing outside the territory of the Member State to which admission is sought.[274] In order to be admitted, ICTs are required to provide as part of their application, *inter alia*, proof that the host entity in the Member State and the undertaking established in a third country belong to the same undertaking or group of undertakings, proof of employment within the same group of undertakings,[275] a work contract and, if necessary, an assignment letter from the employer containing details of the dura-

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269 The intra EU mobility of ICTs is outside the scope of this dissertation and will not be analysed here.
270 For the different definitions, see Article 3 of the ICTD.
271 Articles 3 (e), (f) and (g) of the ICTD.
272 Article 2 (2) of the ICTD.
273 Fridriksdottir, *What Happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in Europan Union Law on Labour Migration,* pp. 227-228.
274 Article 11 (2) of the ICTD.
275 From at least three up to twelve uninterrupted months immediately preceding the date of the intra-corporate transfer in the case of managers and specialists, and from at least three up to six uninterrupted months in the case of trainee employees.

tion of the transfer, the location of the host entity, evidence that the third-country national is taking a position as a manager, specialist or trainee employee in the host entity, the remuneration, terms and conditions of employment granted during the intra-corporate transfer, and evidence that the third-country national will be able to transfer back to an entity in a third country at the end of the intra-corporate transfer, a valid travel document and a visa, if required and proof of sickness insurance or that it has been applied for, unless it is covered by the work contract.[276]

Member States are obliged to provide ICTs with the same remuneration as national workers and the same working conditions as posted workers.[277] And the final obligatory requirement for Member States is not to admit third-country nationals who are considered to be a threat to public policy, public security or public health.[278]

Amongst the optional provisions, Member States can impose a "sufficient resources" requirement[279] and a training agreement requirement for trainees.[280] In line with Article 79 (5) TFEU, Member States can also reject or denounce an ICT application on the basis of national quotas.[281] However, they cannot apply a labour market test, unless this is required by an Act of Accession.[282] Third-country nationals that meet all of these exhaustive admission requirements must then be granted an ICT permit.[283]

Member States are obliged to reject ICT applications when the admission requirements have not been met, the documents presented were "fraudulently acquired, or falsified, or tampered with", the host entity was established for the main purpose of facilitating the entry of intra-corporate transferees, the maximum duration of stay has been reached, [284] and when the employer or the host entity has been sanctioned for undeclared work and/or illegal employment.[285] The Intra-corporate Transferees' Directive provides some optional grounds for rejection, which

276 Article 5 (1) of the ICTD.
277 Article 5 (4) of the ICTD.
278 Article 5 (8) of the ICTD.
279 Article 5 (5) of the ICTD.
280 Article 5 (6) of the ICTD.
281 Article 6 of the ICTD.
282 Recital 21 of the Preamble to the ICTD. Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law,* p. 389.
283 Ibid.
284 Article 7 (1) of the ICTD.
285 Article 7 (2) of the ICTD.

need to be applied by considering the circumstances of the individual case and by respecting the principle of proportionality.[286]

The maximum period of validity of the ICT permit is three years for managers and specialists and one year for trainee employees, after which they are obliged to leave the territory of the Member State. Yet, Member States retain discretion to grant them a residence permit on another basis in accordance with EU or national law, which would consequently allow them to stay.[287] ICTs can also choose to circulate between the respective Member State and their country of origin. However, Member States are free to impose a gap period of up to six months between the end of the maximum duration of the last transfer and another, new, application, before ICTs can return on the same grounds to the same Member State.[288] They may reject an application, when less than six months has elapsed since the ICT concluded his or her previous transfer.[289] This notwithstanding, no minimum period is provided and there is no limit on the amount of times ICTs can re-enter on the basis of an ICT permit.[290] This means that the "temporary nature" of these transfer periods could span several years and include circular elements depending on how Member States have transposed the Intra-corporate Transferees' Directive into national law.[291]

5.2.3. Relevant instruments without explicit reference to circular migration [292]

Single Permit Directive[293]

After the failure of the 2001 Commission proposal for directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, the Commission subsequently

286 Article 7 (5) of the ICTD. For the provisional grounds, see Article 7 (3) of the ICTD.
287 Article 12 (1) of the ICTD.
288 Article 12 (2) of the ICTD.
289 Article 7 (4) of the ICTD. For the rules stipulating refusal to renew and withdrawal of the ICT card, see Article 8 of the ICTD.
290 Fridriksdottir, *What Happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in Europan Union Law on Labour Migration,* p. 239.
291 At the time of writing of this section (updated as of 31 December 2017), the implementation report of the European Commission is pending. For more information on implementation at the national level, see for instance A. de Bie and A. Ghimis, 'The intra-corporate transferees directive:a revolutionary scheme or a burden for multi-nationalcompanies?', *ERA forum, Academy of European Law,* (2017).
292 The Family Reunification Directive is presented in the policy area "Entry conditions of family members" as the general instrument regulating this policy field.
293 Referred in the footnotes as the SPD.

proposed a directive that "does not touch upon admission conditions".[294] Indeed, this is the only directive in the legal migration framework that does not grant a right to third-country nationals to be admitted for employment.[295] Instead, it aims to regulate the admission procedures for employment and sets out the rights to be enjoyed by the third-country national workers, who are granted a single permit.[296] Furthermore, it provides equal treatment rules for third-country national workers: the ones who were admitted for the purpose of work, as well as third-country nationals who were admitted on other grounds, but nevertheless have the right to work under EU or national law.[297]

Excluded from the personal scope of the Single Permit Directive are intra-corporate transferees, EU long-term residence status holders and seasonal workers.[298] In addition, the Single Permit Directive allows Member States to exclude third-country nationals who are authorised to work for no more than six months and those who hold visas from the provisions of Chapter II of the directive, which lays down the rules governing the procedure for applying for the single permit application and the rights attached to the single permit. [299] However, such temporary third-country national workers, who could be circular migrants, are nevertheless covered by its equal treatment clauses. [300]

A Single Permit is defined in the directive as a national residence permit authorising a third-country national to reside on the territory of a respective Member State for the purposes of carrying out work there.[301] This type of permit is also to be issued to workers who have already been admitted and who are applying for a renewal or modification of their residence permit after the transposition of the Single Permit Directive into national law.[302] The procedure for issuing, amending or renewing

294 Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, COM (2007) 638, Brussels, 23 October 2007, p. 3.

295 Article 1, second sub-paragraph, of the SPD. Groenendijk, 'Equal Treatment of Workers from Third Countries: the Added value of the Single Permit Directive', p. 23.

296 Articles 1 and 3 (1) of the SPD.

297 Article 12 (1) of the SPD.

298 See Article 3 (2) of the SPD for a list of all the categories of workers that are excluded from the personal scope of the SPD.

299 Articles 3 (3) and (4) of the SPD. For more details, see S. I. Sanchez, 'Single Permit Directive 2011/98/EU', in K. Hailbronner and D. Thym (eds.), *EU Immigration and Asylum Law. A Commentary* (Second Edition edn.: C. H. Beck /Hart/ Nomos 2016).

300 Article 3 (3) of the SPD.

301 Article 2 (c) of the SPD.

302 Article 4 (4) of the SPD.

a single permit is done through a single application procedure.[303] Member States can decide whether the worker, the employer or either of them,[304] can submit the application and whether the third-country worker needs to be outside their territory when applying for the permit. The competent authorities need to take a decision on the application within four months of the date of receiving the application, unless exceptional circumstances necessitate an extension to this deadline.[305]

The Single Permit Directive does not contain substantive grounds for refusing to grant the permit. Nonetheless, Member States are free to consider applications inadmissible in case national quotas have been reached.[306] The Single Permit Directive entitles migrant workers to enter, reside and have free access to the territory of the Member States.

Even though the Single Permit Directive does not contain any re-entry conditions and cannot therefore be seen as facilitating circular migration in any way, it is nevertheless important to circular migrants, who as workers, can benefit from its provisions once they have entered the territory of the Member State and are admitted to employment.

5.3. Assessment

Legal migration directives

The first entry to the EU labour market for third-country nationals coming from outside the EU is "subject to a wide diversity of conditions, requirements, and restrictions".[307] In addition, unlike for EU citizens, third-country nationals that wish to enter the EU labour market for the first time face 28 different labour national markets, and can ultimately only be admitted to one, even if the same rules are applicable in 25.[308] The question of how easy or how difficult it is to gain access to the EU labour market depends on the profile of the migrant worker, which in turn is a direct result of the sectorial approach to labour migration that

303 Article 4 of the SPD.
304 Article 4 (1) of the SPD.
305 Article 5 SPD of the SPD.
306 Article 8 (3) of the SPD.
307 E. Guild, 'Labour Migration and the European Union', in V. Chetail and C. Bauloz (eds.), *Research Handbook on International Law and Migration* (Edward Elgar Publishing, 2014), p. 385.
308 Ibid., 385.

has developed at the EU level. Even the Blue Card holders that the EU wishes to attract, face fairly restrictive admission conditions.[309]

There are a myriad of obligatory conditions for admission that are related to the existence of a work contract or binding job offer, sufficient resources, sickness insurance, as well as many other optional requirements. For instance, most Member States use the option contained in Article 5(2) of the Blue Card Directive to require the applicant to provide an address in the Member State, which in turn makes the application procedure more burdensome for those who are applying from outside the territory of the EU.[310] Finally, applicants should not be considered to pose threat to public policy, public security or public health, which is, by its very nature, a discretionary requirement.[311]

With regard to all of the "first admissions" migration directives, the Member States retain the power to determine the volumes of admission, as per Article 79 (5) TFEU. This means that they are free to set admission quotas and to reject applications when these quotas are reached. Furthermore, the Member States can impose a labour market test requirement, which could also serve as a basis for rejection.[312] Most Member States have imposed such a test, even in relation to Blue Card holders, who are regarded as in demand and "desired", and they also have the option to do so in relation to seasonal workers. Moreover, Member States can limit eligible applications for Blue Cards to those received from third countries, which can also have the effect of limiting access to the EU territory.[313] In the case of seasonal workers, only applicants who reside outside the territory of the EU are eligible to apply for this permit.[314] Furthermore, brain drain considerations in relation to the country of origin can also be cited as a basis to refuse a Blue Card application.[315]

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309 European Commission, Communication "Towards a reform of the common European asylum system and enhancing legal avenues to Europe", COM (2016) 197 final, Brussels, 6.4.2016, p. 17.

310 European Commission, Communication on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, COM (2014) 287 final, Brussels, 22 May 2014, p. 6.

311 On the wide discretion given to the Member States in this aspect, see Case C-544/15 – Fahimian, ECLI:EU:C:2017:255.

312 See Article 8 (3) of the SWD and Article 8 (2) of the BCD. Member States cannot apply a labour market test to Intra-corporate Transferees, unless this is required by an Act of Accession. See Recital 21 of the Preamble to the ICTD.

313 Article 10 (4) of the BCD.

314 Article 2 of the SWD.

315 Articles 8 (4) of the BCD. This is not widely used in practice, see COM (2014) 287 final, Brussels.

The EU approach to circular migration reflects the sectorial EU labour migration policy and it thus differs depending on the category of migrant. The "first admissions" directives differentiate migrant workers on the basis of their skills and qualifications, as well as their attractiveness for the Member States' labour markets, and they use this as the decisive factors in determining which status is to be assigned to the migrant.[316] The sought after migrants are the ones who possess useful qualifications, because they are considered to positively contribute to the Member States and EU's economy.

Therefore, it is not surprising that following an analysis of the "first admissions" directives, the Blue Card Directive is the most generous instrument insofar as it is able to foster rights-based circular migration. Blue Card holders have the flexibility to circulate both before and after they qualify for a EU long-term residence status, which means that they have control over their migration trajectory and can "move back and forth", and at the same time they are able to aggregate residence periods which could lead to them receiving a permanent residence status.[317] This means that the Blue Card Directive, at least on paper, meets both the benchmark for policies encouraging circular migration as it provides permits that allow periods of absence from the country of destination, which is something that is considered to be conducive to circular migration (see Annex V). Yet again, Member States have discretion to restrict, as a matter of national law, the periods of absences only to specific cases.[318] Furthermore, the failure of the Blue Card Directive and the pending Recast show that even though this instrument provides flexibility in relation to the migration trajectory and rights-based circulation, it has not been widely used due to the restrictive admission conditions and differing implementation that has been seen at national level through parallel rules and procedures for admitting the same category of highly-skilled workers.[319]

With regards to seasonal workers, the approach is to provide for short-term stays coupled with re-entry conditions. As Fudge and Olsson conclude, "what began as a commitment to promoting the circulation of third-country national seasonal

316 On that point, see also Fridriksdottir, *What Happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in Europan Union Law on Labour Migration*; Wiesbrock, Jöst, and Desmond, 'Seasonal Workers Directive 2014/36/EU'; Eisele, 'Why come here if I can go there? Assessing the 'Attractiveness' of the EU's Blue Card Directive for 'Highly Qualified' Immigrants'.

317 See Article 16 (3) of the BCD.

318 Article 16 (5) of the BCD.

319 Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment, COM (2016) 378 final, Strasbourg, 7 June 2016, p. 2. For data, see p. 3.

workers (recital 17)[320] became 'the possibility of facilitated admission procedures' in the adopted Directive (recital 34)".[321] Since, the deadline for the transposition of the Seasonal Workers' Directive expired on 30 September 2016, there is still no comprehensive information which allows the author to assess what kind of measures have been put in place in national law and whether they give priority, in practice, to seasonal workers that have already been admitted, and whether they contribute to circulation friendly policies (see the benchmarks in Annex V).[322]

ICTs are given the opportunity to re-enter after the end of the maximum duration of the last transfer, but Member States have a margin of appreciation and can impose a gap period of up to six months (the so called "cooling off period") between the end of the last three-year transfer and the application for a new transfer, which can in turn decrease the motivation of migrants to circulate.[323] Therefore, the question of whether the Intra-corporate Transferees' Directive could be used to encourage circular migration is in the hands of the Member States.[324]

The Students' and Researchers' Directive does not stipulate any explicit facilitated re-entry conditions, which means that researchers need to re-apply following the general admission procedure[325] and potentially make use of the visa facilitation instruments and visa-free regimes in the context of the Eastern Partnership. The EU Long-term Residence Directive provides some possibilities for the circular migration of settled third-country nationals. However, in cases when migrants want to go back to their countries of origin for longer than 12 months, they are only able to do so if the host Member State allows longer periods of absence. Furthermore, in some of the Member States, the periods of absence are not unconditional.[326] The limited period of absence seriously hinders circularity because of the risk that the status may be lost. Finally, the Single Permit Directive does not contain provisions that are conducive to circular migration. However, it is important to understand whether it contributes to rights-based circular migration as a result of the equal treatment clauses contained therein.

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320 Recital 17 of the Preamble to the SWD Proposal.

321 Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law,* p. 371.

322 For some initial insights, see Chapter 7 on Bulgaria.

323 Article 12 (2) of the ICTD.

324 According to an interim overview of the implementation of the Directive presented by the European Commission during a seminar at the Radboud University on 10 November 2017, Member States seem to regularly make use of this provision.

325 Articles 7 and 8 of the SRD.

326 See D. Vanheule et al., 'Temporary and Circular Migration in Belgium: empirical evidence, current policy practice and future options in EU Member States.', European Migration Network, Belgian National Contact Point, (2011), p. 29.

The EU Visa instruments

One of the instruments that is considered to be conducive to circular migration is the multi-entry visa instrument, which could serve as a "visa waiver" within the period of its validity and allow for "significant savings and efficiency gains" for visa applicants.[327] However, the requirement to issue such a visa to certain categories of travellers can be undermined by the wide margin of appreciation that is given to consulates when they are assessing the "integrity", "reliability" and "genuine intention to leave" conditions.[328]

In addition, Member States possess discretion in relation to the period of validity of these types of visas and they are usually reluctant to issue visas for longer than one year. Data shows that these types of visas are issued, to a large extent, to nationals of third countries with which a Visa Facilitation Agreement has been signed. [329] Furthermore, Article 24 (2) (a) of the EU Visa Code provides examples of the categories of persons who can benefit from such a visa, which, however, could lead to a restrictive interpretation of this provision by consulates and thus have the effect of excluding certain other categories from gaining a multi-entry visas.[330] Finally, the requirement to prove one's economic situation in their country of origin could also have an exclusory effect for many travellers.[331]

Applicants who have obtained a visa are entitled to short-term travel between the Schengen area and the third country.[332] Long-term stays are left to the discretion of the Member States. The only EU obligation of Member States in relation to long-term visas in the field of legal migration concerns visa issue "facilitation" for Blue Card holders, intra-corporate transferees, researchers and their family members.[333] The short-term visa gives its holder the right to travel for business purposes, but it does not given them the right to work in the Schengen area, as an additional work permit or a work visa issued by the respective Member States would be needed to do so.

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327 European Commission, Evaluation of the implementation of Regulation (EC) No 810/2009 of the European Parliament and Council establishing a Community Code on Visas (Visa Code), SWD (2014) 101 final, Brussels, 1 April 2014, p. 22.

328 European Commission, Evaluation of the implementation of Regulation (EC) No 810/2009 of the European Parliament and Council establishing a Community Code on Visas (Visa Code), SWD (2014) 101 final, Brussels, 1 April 2014, pp. 22- 23.

329 European Commission, SWD (2014) 100 final, Brussels, p. 23.

330 Mananashvili, 'Access to Europe in a Globalised World: Assessing the EU's Common Visa Policy in the light of the Stockholm Guidelines', p. 5.

331 Ibid. On the economic situation requirement, see also ibid.

332 Article 2 of the VC.

333 Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law*, p. 436.

This section suggests that visa instruments do not directly facilitate circular migration. They could, however, foster personal travel for temporary visits, especially the local border traffic and the multi-entry visas, which is one of the benchmarks in this policy area (see Annex V). Thus, they could contribute to the initiation of individual circular migration projects and other employment possibilities because they can support job-seeking for those who can access, afford and succeed in obtaining a visa. They can lead to short-term employment, as well to long-term circular migration opportunities, which would need to be authorised as per the national legislation of the particular Member State.

5.4. Work authorisation

Work authorisation is an important policy area to consider with regards to circular migrants, because very often their initial work permits tie them to a specific employer, occupation and locality for a specified period of time, during which they cannot work for another employer. As was already mentioned in Chapter 1, this can pose two types of obstacles for circular migrants. In case of job loss, migrants may be inclined to either overstay in the host country or leave for their home country earlier than their work permits allows, which will lead to them sustaining financial losses. Besides, the impossibility to change employment and sector can increase the risk of exploitation and abuse.

The benchmarks pertaining to work authorisation aim to assess whether workers can change employer and occupation within the maximum restriction of two years, as well as whether the loss or termination of employment constitutes a sole ground for the withdrawal of migrant worker's authorisation of residence or work permit (see Annex V). In addition, the benchmarks assess the possibility to find alternative work in case of loss or termination of employment, and whether seasonal workers who have already been employed in the territory of the Member States for a significant period of time are able to take up other remunerated activities. The identified instrument that can support the implementation of these benchmarks is the availability of a flexible work permit that allows its holder to change both employer and occupation within the period of validity of the permit.

5.4.1. Legal instruments aimed at circular migration facilitation

Seasonal Workers' Directive

During the discussions of the draft Article 11 (now Article 15 of the Seasonal Workers' Directive), which intended to allow seasonal workers to change employer and extend their contract, several Member States, such as Germany, Cyprus and Malta were opposed to its mandatory character, which in turn led to numerous changes to the text of the provision in the Working Group and among the JHA Counsellors. These amendments varied from making the extension of stay and the change of employer optional, to completely omitting the possibility to change employer.[334] The adopted provision was ultimately a compromise between the European Parliament which insisted on the right for seasonal workers to change employer, and the Council's opposition to this amendment.[335]

The final text of Article 15 (3) of the Seasonal Workers' Directive stipulates the possibility for seasonal workers to change their employer and extend their stay within the maximum time limit set by the directive, if the admission criteria are still met. The objective of this provision is to avoid abuse. [336] Taking into consideration the possibility to change employer within the authorised period, this should implicitly mean that the sole fact of unemployment could not lead to withdrawal if the worker secures another job with a different employer within a reasonable time. This "reasonable time" criterion was introduced by the CJEU in its judgment in *Tetik.*[337] It concerned Turkish workers with a right to continue to work under Article 6 (1) of the EEC-Turkey Association Council Decision 1/80[338] but on the basis of comparison with the rights of EU workers.[339] Not allowing for a reasonable period to look for another job would take away the *effet utile* of Article 15(3) and thus be incompatible with the EU law principle of effectiveness. The length of the reasonable time has, according to the CJEU, to be defined in national law. Therefore, whether this is possible in practice would depend on what is stipulated in national law and on the basis of the facts of the individual case.[340]

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334 Fridriksdottir, *What Happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in Europan Union Law on Labour Migration,* pp. 208-209.

335 Fudge and Olsson, 'The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights', p. 461; Wiesbrock, Jöst, and Desmond, 'Seasonal Workers Directive 2014/36/EU', p. 959.

336 Recital 31 of the Preamble to the SWD.

337 C-171/95 - Tetik v Land Berlin, ECLI:EU:C:1997:31.

338 See Paras 27, 30-32, 42 and 48.

339 On the analogous interpretation, see K. Groenendijk, K. 'Recent Developments in EU Law on Migration: The Legislative Patchwork and the Court's Approach', European Journal of Migration and Law, 16 (2014), pp. 328-334.

340 See also Wiesbrock, Jöst, and Desmond, 'Seasonal Workers Directive 2014/36/EU', p. 959.

In addition, Member States enjoy discretion to allow further changes of employer and extensions within the maximum period provided for in the Seasonal Workers' Directive.[341] By way of derogation to the rule that applications have to be submitted in the workers' country of origin, seasonal workers are not required to leave the territory of the Member State in question in order to apply for an extension.[342] However, Member States are permitted to perform a labour market test in the context of an extension application, and they can reject applications when there are other qualified residents who could potentially fill the vacancy.[343] It must be noted that depending on the authorised length of the seasonal work and the length of the renewal procedure, it might be not worth starting such a procedure in the first place.[344]

Moreover, although seasonal workers are able to change employer, it follows that they can only be engaged in seasonal work.[345] According to Articles 5 and 6 of the Directive, the type of seasonal work that they can undertake should be specified in their contract and depends on the decision taken by the respective Member State, listing the sectors of employment which include activities that are dependent on the passing of the seasons. Even though the Seasonal Workers' Directive does not explicitly provide for the change of seasonal occupation, this should be possible because in order to meet the admission criteria of Articles 5 and 6 of the directive, it is sufficient that the type of work is specified in the contract with the new employer.

Blue Card Directive

During the first two years of legal employment, the Blue Card holders are tied to their employer and occupational sector, for which they were initially admitted.[346] Changes of employer during these first two years are subject to receiving prior authorisation from the competent authorities of the Member State of residence, in accordance with national procedures.[347] Modifications which affect the admission conditions are subject to prior communication or prior authorisation, if this is required by national law. After the initial two year period, Member States may

341 Articles 15 (2) and (4) of the SWD.
342 Wiesbrock, Jöst, and Desmond, 'Seasonal Workers Directive 2014/36/EU', p. 959. Article 15 (5) of the SWD.
343 Article 15 (6) of the SWD.
344 Fridriksdottir, *What Happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in Europan Union Law on Labour Migration,* pp. 208-209.
345 Recital 31 of the Preamble to the SWD, Articles 2 (1) and 2 (2) of the SWD.
346 Article 12 (1) of the BCD. On that note, see also Eisele, 'Why come here if I can go there? Assessing the 'Attractiveness' of the EU's Blue Card Directive for 'Highly Qualified' Immigrants', p. 24.
347 Article 12 (2) of the BCD.

grant Blue Card holders equal treatment with nationals concerning access to highly-qualified employment.[348] If a Member State decides to retain the restrictions, Blue Card holders must notify any such changes to the national authorities.[349] In the proposal for a new Blue Card Directive, access to the labour market is eased.[350] According to the proposed Article 13, Blue Card holders are entitled to full access to highly-skilled employment. Member States may require Blue Card holders to communicate changes of employer or changes that can affect the fulfilment of the admission conditions to the relevant authorities.[351]

Another important element concerning the work authorisation is the effect of any temporary unemployment. According to Article 13 of the Blue Card Directive, unemployment does not automatically lead to the withdrawal of a Blue Card, unless the period of unemployment exceeds three consecutive months, or when it occurs more than once during the period of validity of the Blue Card.[352] During this three month period, the Blue Card holder is entitled to seek and take up employment under the conditions set out in Article 12 of the Blue Card Directive, which provides the general labour market access.[353]

5.4.2. Instruments that contain some circular migration elements

Intra-corporate Transferees' Directive

The aim of the Intra-corporate Transferees' Directive is intra-company transfer, which implies employment with the same company in the host Member State. Therefore, ICTs cannot change their employer or occupation within the period of validity of the ICT.[354] The ICT has a right to exercise only the specific employment activity for which the permit was granted.[355] Even though there is no explicit provision stating that unemployment in the case of ICTs could lead to withdrawal

348 Article 12 (1), second sentence - according to Article 4 (2) (b) of the BCD, this article is a "minimum standards" rule. Both Bulgaria and Poland do not apply this option. European Commission, COM (2014) 287 final, Brussels, p. 9.
349 Article 12 (2), second sentence - according to Article 4 (2) (b) of the BCD, this article is a "minimum standards" rule.
350 Article 13 of the BCD Recast Proposal, p. 17.
351 For possible derogations from this rule, see Article 13 (3) of the BCD Recast Proposal.
352 The standard period of validity of the EU Blue Card is one year in BG, CY, ES, LT, MT and PT, and 13 months in BE. AT, CZ, EL, FI, IT, LU, PL, RO, SE and SI set the period at two years and EE at two years and three months. FR and SK set it at three years and DE, HU and NL set it at four years. LV set it at five years. Source: European Commission, COM (2014) 287 final, Brussels, p. 7.
353 Article 13 (2) of the BCD.
354 Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law,* p. 390.
355 Article 17 of the ICTD.

of the permit, this would naturally affect the admission conditions that are stipulated in Article 5 of the Intra-corporate Transferees' Directive.[356] However, the Intra-corporate Transferees' Directive does not oppose any national rules that would allow for ICTs to look for another job after the contract with the original company has ended. Article 4 of the directive allows more favourable treatment with regard to the Articles 15, 18 and 19 and the first sentence of Article 17 of the directive allows Member States freedom to grant more rights.

Students' and Researchers' Directive

No explicit provisions are foreseen in the Students' and Researchers' Directive that allow for a change of hosting research institution. However, the wording of Article 21 (5) of the Students' and Researchers' Directive implicitly sets out this possibility by stating that in cases when the researcher applies for a renewal of authorisation to enter into an employment relationship with a host institution, and not continuing the employment relationship with the same host institution, Member States can apply labour market tests in this regard. Therefore, researchers should be able to change their hosting research institution with another one if it has a hosting agreement that meets the requirements of the admission conditions specified in Article 10 of the Students' and Researchers' Directive.

There is no mention in the Students' and Researchers' Directive as to whether unemployment could automatically lead to the withdrawal of the residence permit.[357] Article 10 (5) states that the hosting agreement should automatically lapse when the legal relationship between the researcher and the research organisation is terminated. In addition, Article 10 (8) leaves discretion to Member States to regulate in national law what the consequences would be for researchers' authorisations as a result of withdrawal of the approval or the refusal to renew the approval of the hosting agreements. Therefore, the directive does not oppose any national rules that would allow the researchers to look for another research organisation or job. Not allowing for a reasonable period to look for another job would also take away the *effet utile* of Article 25 of Students' and Researchers' Directive allowing researchers to seek employment or set up a business for a period of at least nine months after completion of their research.

356 See Article 8 (5) of the ICTD in connection with Article 14 of the ICTD.
357 See Article 21 (1) (a) of the SRD.

5.4.3. Relevant instruments without explicit reference to circular migration

The Single Permit Directive does not contain any rules on the renewal or withdrawal of the permit. Therefore, the issue of whether unemployment leads to the withdrawal of the permit would depend on what is stipulated in national law. The Single Permit Directive does not contain any time limits on restrictions in relation to change of employer and/or occupation. Therefore, these provisions are regulated by national law and will consequently vary from one Member State to the next.

5.5. Assessment

The two instruments that aim to facilitate circular migration – the Blue Card Directive and the Seasonal Workers' Directive – explicitly provide for change of employer. This possibility is implicitly provided for researchers. ICTs, however, are tied to their employer. The analysed instruments do not legislate for change of occupation, which is a direct result of the EU's sectorial approach to labour migration. This means that depending on the transposition into national law, only the Blue Card Directive could fulfil the benchmark in the area of work authorisation pertaining to free access to employment in all industries and occupations with a maximum restriction of two years. This also means that seasonal workers cannot look for alternative employment, other than seasonal work. Allowing for such a possibility is another benchmark in this policy area (see Annex V). However, Member States can provide more favourable provisions to third-country nationals who come as seasonal workers on the basis of bilateral agreements (Article 4 of the Seasonal Workers' Directive).

Article 13 (1) of the Blue Card Directive explicitly stipulates that unemployment does not automatically lead to the withdrawal of the permit, unless the period of unemployment exceeds three consecutive months and occurs more than once during the period of validity of the permit. In the case of ICTs, unemployment would lead to the withdrawal of the permit.[358] The Seasonal Workers' Directive and the Students' and Researchers' Directive do not explicitly legislate in this regard, which means the outcome will depend on how the respective directives have been transposed into national law by the Member States. This means that only the Blue Card Directive explicitly provides for the possibility to find alter-

358 Article 8 (5) (a) of the ICTD in connection with Article 14 of the ICTD.

native work in case of loss of employment and thus fulfils this policy area benchmark (see Annex V).

5.6. Residence status

As was already mentioned in the first chapter, "leakage" into permanent settlement in the country of destination is an inherent characteristic of circular migration.[359] However, this is generally not reflected in the legal and policy frameworks. Typically, migrants initially enter on the basis of a visa or a temporary residence permit, which has a limited duration (frequently less than or up to one year). Some temporary residents have the right to obtain a permanent status after a certain period of residence in the country of destination (predominantly highly-skilled workers) and others are denied a path to permanent settlement (e.g., low-skilled workers). Governments guard access to long-term residence and this consequently leads to less security and integration opportunities for migrants, who are expected to return to their country of origin after the expiration of their permits.

Even though access to a residence permit and circular migration might seem, at first glance, like two separate and unrelated policy areas, it is important to see whether legally residing migrants have the opportunity to qualify for a prolonged or permanent residence status, which is one of the benchmarks that is applied in this policy area (see Annex V). The instrument for implementation of the latter standard is whether migrants can make use of a residence permit which permits them to transit from a temporary to a permanent residence status. In addition, this section looks into whether migrants have the right to free movement and choice of residence within the host country (see Annex V).

In order to assess whether circular migrants who move between the EU and their countries of origin can access long-term residence, this section focuses on the scope, the duration of residence, the conditions for acquiring and refusing to grant the long-term residence status in the context of the EU Long-term Residence Directive, as well as the special rules contained in the other EU legal migration directives, such as in the Blue Card Directive and the Students' and Researchers' Directive. Since the countries chosen for case studies do not impose any integra-

359 R. Skeldon, 'Going Round in Circles: Circular Migration, Poverty Alleviation and Marginality', *International Migration,* 50/3 (2012), p. 53.

tion requirements, these articles are not examined in greater detail, even though they are relevant to the topic of circular migration.[360]

5.6.1. Relevant instruments without explicit reference to circular migration

EU Long-term Residence Directive[361]

The EU Long-term Residence Directive provides the general rules on access to this status, thus it is logical to begin the analysis by looking at this directive.[362] Third-country nationals who have resided "legally and continuously" within their territory for five years immediately prior to the submission of the relevant application have the right to the EU long-term residence status.[363] Periods of absence from the host Member State which are shorter than six consecutive months and do not exceed a total of ten months within the five-year period do not count as an interruption and therefore they should be taken into account for the purposes of calculating the necessary period. [364] Member States may allow longer periods of absences in "cases of specific or exceptional reasons of a temporary nature and in accordance with their national law".[365] In such cases, the relevant period of absence should not be taken into account in the calculation of the five-year period. Yet, Member States can also derogate from that rule and take into account absences relating to employment purposes in the calculation of the five-year period.[366] Amongst others, prior residence "solely on temporary grounds" or where the residence permit has been "formally limited" is not considered in the

360 In this regard, see for instance S. Carrera, 'Integration of Immigrants in EU Law and Policy: Challenges to Rule of Law, Exceptions to Inclusion', in L. Azoulai and K. D. Vries (eds.), *EU Migration Law: Legal Complexities and Political Rationales* (Oxford University Press 2014); S. Carrera, *In Search of the Perfect Citizen?: The Intersection Between Integration, Immigration and Nationality in the EU* (Immigration and Asylum Law and Policy in Europe: Martinus Nijhoff Publishers 2009); T. Strik and A. Böcker, 'Language and Knowledge tests for Permanent Residence Rights. Integration tests, help or hindrance?', *European Journal of Migration and Law,* 13/2 (2011); Y. Pascouau and T. Strik (eds), *Which Integration Policies for Migrants? Interaction between the EU and its Member States* (Wolf Legal Publishers 2012).

361 Referred in the footnotes as the LTRD.

362 On the process of its adoption, see D. A. Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship. An Analysis of Directive 2003/109* (Brill | Nijhoff, 2011), pp. 77-93. See also D. A. Arcarazo, 'Civic Citizenship Reintroduced? The Long-Term Residence Directive as a Post-National Form of Membership', *European Law Journal*, 21 (2) (2015).

363 Recital 6 of the Preamble to the LTRD and Article 4 (1) of the LTRD.

364 Article 4 (3) of the LTRD.

365 Article 4 (3), second sub-paragraph, of the LTRD.

366 Article 4 (3), third sub-paragraph, of the LTRD.

computation of the five-year period.[367] The EU Long-term Residence Directive also excludes from its scope third-country nationals who reside on such "temporary" or "formally limited permits".[368]

According to the CJEU in the *Singh* case, the latter two conditions are distinct autonomous exceptions,[369] which need to be interpreted through the prism of the directive's integration objective.[370] Taking into account that "it is the duration of the legal and continuous residence of 5 years which shows that the person concerned has put down roots in the country",[371] in the CJEU's opinion the EU Long-term Residence Directive excludes from its scope residence that "does not *prima facie* reflect any intention on the part of such nationals to settle on a long-term basis".[372] As Thym stresses, the identification of residence of temporary or limited character does not follow formal criteria, but rather it needs to be assessed whether the purpose and nature of the residence permit, regulated both in national and EU law, is intended to lead to settlement.[373] The CJEU confirmed that the EU Long-term Residence Directive only gives examples and does not exhaustively list all cases of residence that are linked to activities of temporary nature.[374] Therefore, for instance, in addition to seasonal workers and au pairs, ICTs and the Schengen visa holders are also amongst the categories of individuals that could be potentially excluded from the scope of the EU Long-term Residence Directive.[375]

According to the CJEU, "[i]n contrast with the situation of third-country nationals whose residence is based solely on temporary grounds, in which it is clear that that temporary nature does not permit the long-term residence of the third-country national concerned, the fact that a residence permit contains a formal restriction does not in itself give any indication as to whether that third-country national might settle on a long-term basis in the Member State, notwithstanding the existence of such a restriction".[376] In its judgment, the CJEU clarified that a formally limited residence permit within the meaning of national law, which can be extended and does not prevent long-term residence in practice, could not be

367 Article 4 (2) of the LTRD in connection with Article 3 (2) (e) of the LTRD.
368 For more details on the other exceptions, see Article 3 of the LTRD.
369 Case C-502/10 - Singh, ECLI:EU:C:2012:636, Paras. 30-38. Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law,* p. 423.
370 Case C-502/10 - Singh, ECLI:EU:C:2012:636, Paras. 40-45.
371 Ibid., Para. 46.
372 Ibid., Para. 47.
373 Thym, 'Long Term Residents Directive 2003/109/EC', p. 445.
374 Case C-502/10 - Singh, ECLI:EU:C:2012:636, Para. 48.
375 Thym, 'Long Term Residents Directive 2003/109/EC', p. 445.
376 Case C-502/10 - Singh, ECLI:EU:C:2012:636, Para. 50.

considered as a formally limited residence permit within the meaning of the EU Long-term Residence Directive.[377] Otherwise the achievement of the objectives pursued by the directive would be jeopardised and it would be deprived of its effectiveness as a result.[378]

Article 5 of the EU Long-term Residence Directive spells out two mandatory requirements for acquiring the EU long-term residence status – sufficient income and sickness insurance – and one optional requirement, which are both exhaustive in nature.[379] The applicant has to have "stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned" as well as sickness insurance.[380] The text of these requirements in Article 5 (1) of the EU Long-term Residence Directive are identical to the requirements in Article 7(1) of the Family Reunification Directive, as both instruments were negotiated at the same time in the Council's Working Group.[381] Therefore, these conditions should be interpreted in the light of the CJEU's ruling in the *Chakroun* case:[382] taking into account the needs of the individual and not setting a standard amount below which an application will be refused and also considering the income of the family members when assessing the requirement of sufficient recourses.[383]

In addition, Member States may impose integration conditions, in accordance with national law.[384] In the *P and S*[385] judgment, the CJEU ruled on the imposition of integration conditions after the granting of the EU long-term residence status. It stated that the obligation to pass an integration requirement ensures that the third-country nationals acquire knowledge of the language, which is useful for their integration in the host Member State and this does not jeopardise the achievement of the objectives pursued by directive.[386] However, the CJEU stressed that Member States are limited by the objectives of the directive when they are imple-

377 Ibid., Para. 51.
378 Ibid.
379 K. Groenendijk, 'Long-Term Residents', in Steve Peers et al. (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 2: EU Immigration Law*, p. 302.
380 Article 5 (1) of the LTRD.
381 K. Groenendijk, 'Long-Term Residents', in Steve Peers et al. (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 2: EU Immigration Law*, p. 301.
382 Case C-578/08 Rhimou Chakroun v. Ministervan Buitenlandse Zaken, ECLI:EU:C:2010:117.
383 Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law,* p. 424 (footnote 914).
384 Article 5 (2) of the LTRD.
385 Case C-579/13 - P and S v. Commissie Sociale Zekerheid Breda and College van Burgemeester en Wethouders van de gemeente Amstelveen, ECLI:EU:C:2015:369.
386 Ibid., Para. 48.

menting the integration obligation and they need to have regard to: "the level of knowledge required to pass the civic integration examination", "the accessibility of the courses and material necessary to prepare for that examination", "the amount of fees applicable to third-country nationals as registration fees to sit that examination" and "the consideration of specific individual circumstances, such as age, illiteracy or level of education".[387]

Member States can also refuse to grant the EU long-term residence status on grounds of public policy or public security. According to the case law of the CJEU, such provisions must be interpreted in line with the same exceptions that are found in EU free movement law.[388] By comparison, third-country national students may be refused entry and residence to an EU Member States, if they pose a 'potential' threat to public security, as the CJEU held in *Fahimian*. [389] The assessment of facts that Member States undertake in this regard, may thus take into account not only the personal conduct of the applicant but also other elements relating, in particular, to his professional career.

The EU Long-term Residence Directive does not contain any provision in relation to application fees and Member States are therefore free to determine the amount of the fees that they charge. Nonetheless, after the judgment in *Commission v. the Netherlands*,[390] the Member States' discretion has been limited and they are not allowed to charge fees that could prevent third-country nationals from applying for this status and thus undermine the *effet utile* of the directive. [391] The CJEU has reconfirmed that principle in the case of *CGIL and INCA,* where the fees that the Italian Government were charging for renewal of the permits under the EU Long-term Residence Directive were found to be "disproportionate in the light of the objective pursued by that directive and is liable to create an obstacle to the exercise of the rights conferred by that directive".[392]

According to Article 11 (1) (h) of the EU Long-term Residence Directive, long-term residents have free access to the entire territory of the Member States concerned, within the limits provided by national law for security reasons.

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387 Ibid., Para. 49-54.
388 Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law,* p. 425 (footnote 916).
389 Case C-544/15 - Fahimian, ECLI:EU:C:2017:255, Para. 40.
390 Case C-508/10 - Commission v. the Netherlands, ECLI:EU:C:2012:243.
391 Ibid., Paras. 65, 69-70.
392 Case C-309/14 - CGIL and INCA, ECLI:EU:C:2015:523, Paras. 25-31.

5.6.2. Legal instruments aimed at circular migration facilitation

Blue Card Directive

By way of derogation to the EU Long-term Residence Directive, Blue Card holders are granted facilitated access to the EU long-term residence status. Apart from the derogation regarding periods of absence from the calculation of the required five-year period of legal and continuous residence in the EU in Article 16 (3) of the Blue Card Directive, Blue Card holders can also make use of the possibility to accumulate periods of residence in different Member States, which is to be counted toward the required five year period. In order to make use of this option, Blue Card holders need to have lived legally and continuously in the Member States for two years immediately prior to the submission of the application as an EU Blue Card holder and they must do this within the territory of the Member State where the application for the EU long-term residence permit is lodged.[393]

The proposal for a new Blue Card Directive envisages even greater facilitation to EU long-term residence status by requiring Member States to grant the status to third-country nationals who have legally and continuously resided as EU Blue Card holders within their territory for three years immediately prior to the submission of the relevant application.[394] However, Member States will retain discretion to withdraw the status before the required five-year period of legal and continuous residence has been completed, specifically when the third-country national has become unemployed and does not have any sufficient resources to maintain him/herself and any family members.[395]

Blue Card holders have free access to the entire territory of the Member State concerned, within the limits provided for by national law.[396]

Seasonal Workers' Directive

During their authorisation period, seasonal workers have the right to enter and stay on the territory of the respective Member State and they have free access to its entire territory.[397] Article 14 (1) of the Seasonal Workers' Directive sets out a maximum period of stay for seasonal workers that is between five and nine

393 Article 16 (2) (b) of the BCD.
394 Article 17 (2) of the BCD Recast Proposal by way of derogation to Article 4 (1) of the LTRD.
395 Article 17 (2), second paragraph, of the BCD Recast Proposal.
396 Article 14 (1) (h) of the BCD.
397 Article 22 of the SWD.

months in any 12-month period.[398] Member States may also set a maximum period of time in any 12-month period, when employers are allowed to hire seasonal workers.[399] The seasonal workers are obliged to leave the county after the expiry of this period.[400]

The idea behind a multi-season permit, which was part of the Commission's initial proposal, would have allowed the issuance of up to three seasonal worker permits.[401] The final text of the Seasonal Workers' Directive, however, does not set a limit to the number of times a seasonal worker can re-enter, which could lead to a risk that seasonal permits are continuously issued, thereby depriving seasonal workers of a pathway to the EU long-term residence status or another more secure residence status.[402] According to Article 14 (1) of the Seasonal Workers' Directive, Member States can prolong the stay of these workers on the basis of other national permits or EU law permits on grounds other than seasonal work.[403] This is the only possible option for seasonal workers to gain access to EU long-term residence, since they otherwise fall outside the personal scope of the EU Long-term Residence Directive.

5.6.3. Instruments that contain some circular migration elements

Intra-corporate Transferees' Directive

Third-country nationals who were granted an ICT permit have the right to enter and stay in the territory of the first Member State and have free access to the entire territory of that Member State.[404] On the basis of the aforementioned criteria that were developed by the CJEU, it is clear that ICTs are not eligible for an EU long-term residence permit, unless they are granted a national or other EU permit that

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398 For the positions of the Member States during the Council negotiations, see Fridriksdottir, *What Happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in Europan Union Law on Labour Migration,* pp. 206-208.

399 Article 14 (2) of the SWD.

400 Article 14 (1) of the SWD.

401 See the Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM (2010) 379, Brussels, 13 July 2010, p. 3 and Recital 17 of the Preamble to the BCD. For more details, see also Töttos, 'The Past, the Present and the Future of the Seasonal Workers Directive', p. 51.

402 A. Lazarowicz, 'A success story for the EU and seasonal workers' rights without reinventing the wheel', European Policy Centre Policy Brief, (28.3.2014). Wiesbrock, Jöst, and Desmond, 'Seasonal Workers Directive 2014/36/EU', p. 961.

403 See also Fudge and Olsson, 'The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights', p. 456.

404 Article 17 of the ICTD.

allows them to accumulate residence periods for the purposes of ascertaining such a status.

Students' and Researchers' Directive

A new provision that was introduced by the Recast Students' and Researchers' Directive sets out the possibility for researchers to stay on the territory of the Member States for the purpose of job-seeking or entrepreneurship after the completion of their research activity.[405] For this purpose, if the general admission conditions in Article 7 of the directive are still fulfilled, Member States are required to issue a residence permit for at least nine months.[406] Yet, Member States are obliged to obtain confirmation of the completion of the research activity by the research organisation.

Like the Researchers' Directive, the Recast Students' and Researchers' Directive does not contain any provision on the relationship with the EU Long-term Residence Directive. However, the lack of an explicit derogation in both directives, the exhaustive nature of the regulated exclusions and the directives' respective aims, means that researchers must be able to qualify for the EU long-term residence status.[407] The only explicit link to the EU Long-term Residence Directive in the Students' and Researchers' Directive is a provision excluding the third-country nationals who have already been granted an EU long-term residence status from its scope.[408] The residence permits under the Students' and Researchers' Directive are renewable as long as the admission conditions for their issue are met and thus cannot be considered to fall outside the scope of the EU Long-term Residence Directive on the basis of being "temporary" or "limited". Furthermore, this would run contrary to the aims of the directive.[409]

5.7. Assessment

All of the "first admissions" directives allow for free movement within the Member States and choice of residence, which fulfils the first benchmark in this policy area. Technically, only seasonal workers could be limited, to a certain extent, in relation to their choice of residence in cases when it is arranged by

405 Article 25 of the SRD.
406 Article 25 (3) of the SRD.
407 S. Peers, 'Admission of Researchers', in Steve Peers et al. (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 2: EU Immigration Law*, p. 138.
408 Article 2 (2) (d) of the SRD.
409 See Recital 4 of the Preamble to the SRD.

the employer.[410] Even though the directive contains safeguards ensuring that the accommodation provided by the employer guarantees an adequate standard of living and meets the general health and safety standards of the respective Member States, it does not address employer-organised accommodation, which could lead to abuse and dependency.[411]

The EU Long-term Residence Directive excludes from its scope third-country nationals who reside on such "temporary" or "formally limited permits", such as ICTs and seasonal workers. Therefore, the only option for these two categories of migrants is to switch to another national or EU permit that would allow them to accumulate residence periods for the purposes of obtaining a long-term residence status. On the other hand, Blue Card holders have facilitated access to permanent residence and the Recast Blue Card Directive might give them even greater access to this EU permit.[412] The access to EU long-term residence for researchers is implicitly provided for in the Students' and Researchers' Directive. These are the only two instruments that fulfil the benchmark for the facilitation of prolonged or permanent residence in this policy area (see Annex V).

5.8. Social security coordination

Circular migrants contribute to the social security, pension and health systems of two countries during their different periods of stay as part of their circular movement cycle. This raises the question as to what happens to the accumulated contributions during the circulation period and after migrants decide to settle in one country.

The benchmarks in the field of social security coordination aim to assess what kind of benefits can be exported and whether the general principles of social security coordination are covered: maintenance of the acquired rights and rights in course of acquisition under their legislation, totalisation of periods of insurance, employment or residence and of assimilated periods for the purposes of the acquisition, maintenance or recovery of rights and for the calculation of benefits and equality of treatment. In addition, it aims to assess whether the reimbursement of

410 See Article 20 of the SWD. See also S. Peers, 'Admission of Researchers', in Steve Peers et al. (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 2: EU Immigration Law*, p. 139.

411 See Article 5 (1)(c) and Article 6 (1) (c) of the SWD in connection with Article 20 of the SWD. See also Wiesbrock, Jöst, and Desmond, 'Seasonal Workers Directive 2014/36/EU', p. 966.

412 Article 17 (2) of the BCD Recast Proposal.

social security contributions is possible. Finally, the instruments that support the implementation of these standards are multilateral and bilateral agreements.

Certain groups of third-country nationals, who are family members of EU citizens exercising free movement rights, as well as legally residing third-country nationals who work in a cross-border situation, are covered by the social security legislation for European citizens, namely Regulation No. 883/2004, Regulation No. 987/2009 and Regulation No. 1231/2010, as were presented in Chapter 3. There are other categories of migrant workers whose status is governed by EU Association Agreements.[413] In addition to these two main sources of social security provisions, there are also provisions in the EU legal migration directives. Since the current study focuses on third-country national migrant workers, the relevant equal treatment clauses and provisions on social security coordination provided in these directives need to be considered in this section.

5.8.1. Legal instruments aimed at circular migration facilitation

Seasonal Workers' Directive

The Seasonal Workers' Directive contains an equal treatment clause in Article 23 thereof, which grants very similar rights to those which are granted to Blue Card holders.[414] Despite the fact that the draft provision on equal treatment in the Commission's proposal provided weaker protection than what is envisaged in the ILO Conventions,[415] it was nevertheless met by opposition from the Czech Republic, supported by other Member States amongst which were Bulgaria, Germany, Italy, Latvia, Lithuania and Poland.[416] Nonetheless, the right to equal treatment was considerably strengthened by the active role of the European Parliament, which consistently pushed for amendments during the negotiations.[417]

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413 For more details, see Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law*, p. 352-363.

414 Wiesbrock, Jöst, and Desmond, 'Seasonal Workers Directive 2014/36/EU', p. 968.

415 Fudge and Olsson, 'The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights', p. 457. See also Wiesbrock, Jöst, and Desmond, 'Seasonal Workers Directive 2014/36/EU', p. 968.

416 See Council of the European Union, Note from the General Secretariat of the Council to Working Party on Integration, Migration and Expulsion, 10 January 2011, 5052/11, p. 2 and Council of the European Union, Note from the Presidency to the Social Questions Working Party, 28 March 2011, 8341/11, p. 6.

417 Wiesbrock, Jöst, and Desmond, 'Seasonal Workers Directive 2014/36/EU', p. 969. For more details see Fudge and Olsson, 'The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights', pp. 457-459.

Article 23 of the Seasonal Workers' Directive sets out, amongst other things, the right of admitted seasonal workers to equal treatment with nationals in relation to branches of social security, as are defined in Article 3 of Regulation (EC) No. 883/2004.[418] Nevertheless, the directive leaves discretion to the Member States to impose restrictions to the equal treatment clause in relation to social security by excluding family benefits and unemployment benefits. According to Verschueren, this means that Member States can deny entitlements to these benefits even when seasonal workers qualify for them by meeting the conditions imposed on national workers and in cases when they or their employers have paid contributions for these benefits.[419]

This limitation was introduced by the Council and it is in line with the temporary nature of the seasonal workers' stay that is permitted under the Seasonal Workers' Directive and the fact that these migrant workers are supposed to keep their principal place of residence in their home country.[420] This might mean in practice that seasonal workers will not have access to social security benefits under national legislation reserved for persons who have their main residence in the host country and it is unclear whether this would also deprive them of entitlements to health care.[421]

Finally, the last paragraph of Article 23 (1) of the Seasonal Workers' Directive contains an entitlement for seasonal workers or the survivors of such workers residing in a third country to statutory pensions based on the seasonal workers' previous employment and under the same export conditions that are available for nationals when they move to a third country. Most importantly, this equal treatment clause does not depend on the existence of an agreement with the respective third country. Still, seasonal workers cannot benefit from invalidity and death pensions because neither the Seasonal Workers' Directive, nor the Single Permit Directive, which excludes seasonal workers from its scope, provide for an entitlement in this regard for these migrant workers.[422] Whether these workers could

418 Article 23 (1) (d) of the SWD. For the nine branches covered by Article 3 of Regulation (EC) No. 883/2004, see Chapter 3, section 3.8.2.2.

419 H. Verschueren, 'Employment and Social Security Rights of Third-Country Labour Migrants under EU Law: An Incomplete Patchwork of Legal Protection', *European Journal of Migration and Law* 18 (2016), p. 389.

420 See Article (3) (b) of the SWD and Recital 46 of the Preamble to the SWD. See also Council of the European Union, Note from the Presidency to Permanent Representatives Committee (part II), 11 October 2013, 14683/13, p. 6.

421 Verschueren, 'Employment and Social Security Rights of Third-Country Labour Migrants under EU Law: An Incomplete Patchwork of Legal Protection', p. 390.

422 Ibid., p. 390.

benefit from such pensions will depend on the implementation of the Seasonal Workers' Directive in national law, since in some cases statutory pensions could also cover invalidity and survivors' benefits.

Blue Card Directive

Blue Card holders enjoy equal treatment with nationals of the Member States for the branches of social security that are defined in Regulation No. 1408/71, which is now Regulation No. 883/2004.[423] Yet, according to Article 14 (3) of the Directive the right to equal treatment shall be without prejudice to the right of the Member States to withdraw or refuse to renew the EU Blue Card in accordance with Article 9 in cases such as for instance, whenever the holder does not have sufficient resources to maintain him/herself and where applicable his/her family members, without having recourse to the social assistance system of the Member State concerned. Furthermore, Blue Card holders are not entitled to family benefits for family members residing in a third country.[424]

Blue Card holders are also entitled to export statutory old age pensions, "at the rate applied by virtue of the law of the debtor Member State(s) when moving to a third country".[425] According to this provision, which is the first of its kind among the legal migration directives, Member States are required to pay pensions to the former Blue Card holders when they move to a third country, even when there is no bilateral social security agreement in force between the two respective countries.[426] Due to the fact that this is an equal treatment clause, the only requirement is that the Member State provide this type of social security export for its own nationals.[427] Yet, this provision applies without prejudice to existing bilateral agreements.[428]

Furthermore, this provision on the export of statutory pensions only covers old-age pensions, while Article 12 (4) of the Single Permit Directive allows for a wider range of invalidity and death pensions to be exported; since Blue Card

423 Article 14 (1) (e) of the BCD.
424 Recital 18 of the Directive. See also H. Verschueren (fothcomming), 'Employment and Social Security Rights of Third-Country Nationals under EU Labour Migration Directives', *European Journal of Social Security.*
425 Article 14 (1) (f) of the BCD.
426 Verschueren, 'Employment and Social Security Rights of Third-Country Labour Migrants under EU Law: An Incomplete Patchwork of Legal Protection', p. 383.
427 Ibid.
428 This means that if there is a bilateral agreement between the two respective countries, it will apply.

holders are not excluded from the scope of the Single Permit Directive, they too can benefit from these rights as a result of this provision.[429]

5.8.2. Instruments that contain some circular migration elements

Intra-corporate Transferees' Directive

ICTs are entitled to equal treatment with the nationals of the Member State, where the work is carried, in relation to the branches of social security that are defined in Article 3 of Regulation (EC) No. 883/2004, subject to the application of bilateral agreements with the country of origin or the national law of the Member State.[430] As Verschueren stresses, as a result of that in practice it is possible that the ICTs are not subject to the social security legislation of the host Member State.[431] Member States retain discretion with regard to family benefits and can decide to restrict them to intra-corporate transferees who have been authorised to reside and work in the territory of a Member State for a period not exceeding nine months.[432] In addition, Article 18 (2) (d) of the Intra-corporate Transferees' Directive provides for the export of old-age, invalidity and death statutory pensions for the intra-corporate transferees or their survivors in accordance with the legislation contained in Article 3 of Regulation (EC) No. 883/2004, under the same conditions and at the same rates as the nationals of the Member State concerned, when they move to a third country.

Students' and Researchers' Directive

The new Students' and Researchers' Directive extends the equal treatment rules of the Single Permit Directive to researchers, as is provided for in Articles 12 (1) and (4) thereof. The Students' and Researchers' Directive does not waive all possible restrictions on equal treatment and Member States can still limit researchers' rights to family benefits to members who are residing in a third country, as well as excluding researchers who live in a Member State for a maximum period of six months.[433] In line with Article 12 (4) of the Single Permit Directive, they are

429 Groenendijk, 'Equal Treatment of Workers from Third Countries: the Added value of the Single Permit Directive', p. 35.
430 Article 18 (2) (c) of the ICTD.
431 Verschueren, 'Employment and Social Security Rights of Third-Country Labour Migrants under EU Law: An Incomplete Patchwork of Legal Protection', p. 393.
432 Article 18 (3) of the ICTD.
433 Articles 22 (2) (b) and (c) of the SRD.

guaranteed equal treatment with nationals of the Member State and can benefit from the export of pensions, if nationals are entitled to such rights.

5.8.3. Relevant instruments without explicit reference to circular migration

Single Permit Directive

The Single Permit Directive contains an "elaborate provision" on the right to equal treatment in Article 12 thereof.[434] Regarding social security, it means that workers shall enjoy equal treatment with the nationals of the Member State where they reside with regards to all branches of social security, as they are defined in Regulation No. 883/2004. However, according to Article 12 (2) (b) of the Single Permit Directive, Member States can restrict equal treatment in relation to social security rights in cases when third-country nationals are no longer in employment and are not registered as being unemployed, after being employed for less than six months.

Furthermore, Member States may decide not to apply the equal treatment clause with regards to family benefits for third-country nationals who are authorised to work on the territory of the Member State for a period not exceeding six months or who are allowed to work on the basis of a visa.[435] According to the ruling of the CJEU in *Martinez Silva,* "(...) Directive 2011/98 provides for certain third-country nationals a right to equal treatment, which is the general rule, and lists the derogations from that right which the Member States have the option of establishing. Those derogations can therefore be relied on only if the authorities in the Member State concerned responsible for the implementation of that directive have stated clearly that they intended to rely on them".[436] In addition, on the basis of Recital 24 of the Preamble to the Single Permit Directive, Member States are not required to grant family benefits to members who reside in a third country.

With regards to the export of benefits, Article 12 (4) of the Single Permit Directive entitles third-country nationals who are moving to a third country and their survivors that are left behind in a third country to the payment of old age, invalidity

434 Verschueren, 'Employment and Social Security Rights of Third-Country Labour Migrants under EU Law: An Incomplete Patchwork of Legal Protection', p. 386.

435 And also to nationals who are admitted for the purpose of study who fall outside the scope of this study.

436 Case C-449/16 - Martinez Silva, ECLI:EU:C:2017:485, Para. 29.

and death pensions under the same conditions and rates as for nationals of the Member State when they move abroad. This also applies in situations where there is no bilateral social security agreement in force between the Member State and the third country.[437]

5.9. Assessment

The "first admissions" directives do not have the same approach to the different categories of migrants and allow Member States room to provide exceptions to the equal treatment provisions. Furthermore, they are relevant for the social security rights of third-country nationals, but they are not instruments that coordinate social security systems. For instance, these directives do not contain any provisions on aggregation of periods of insurance, employment and residence. For migrant workers this could mean that even in cases where they have fulfilled such periods in their home country, they might not be able to bring these into account in order to obtain the right to social security benefits that according to the national legislation of the host Member State depend on having fulfilled such waiting periods.[438] Therefore, the social security coordination between the Member States and third countries remains subject to the conclusion of bilateral agreements between the individual states. Thus, the social security provisions in the EU legal migration directives are "empty shells" that need to be analysed through the prism of national law regulations pertaining to nationals, including any bilateral agreements concluded with third countries. One can understand the actual entitlements for third-country nationals in practice and examine whether they fulfil the international standards in this area, employed as benchmarks in the current study, only by examining these agreements in detail. In addition, none of the instruments outlined above provide for the reimbursement of social security contributions, which constitutes another benchmark in this policy area (see Annex V).

5.10. Entry and residence conditions for family members

Chapter 1 presented the policy issues at stake with regards to circular migration and outlined two areas that can influence the willingness of migrants to engage

437 Verschueren, 'Employment and Social Security Rights of Third-Country Labour Migrants under EU Law: An Incomplete Patchwork of Legal Protection', p. 387.

438 On that, see also H. Verschueren (fothcomming), 'Employment and Social Security Rights of Third-Country Nationals under EU Labour Migration Directives', *European Journal of Social Security.*

in this type of migration. One of them is the possibility for circular migrants to reunite with their families. Therefore, this section begins with an analysis of the Family Reunification Directive, since this is the instrument which provides the general rules on family reunification in the EU. Even though the directive does not mention the term circular migration, the right to family reunification for circular migrants should be considered because it can serve as a "litmus" for what kind of policies the EU is putting in place: a rights-based approach or a revival of the guest-working models. The guest workers were not allowed to bring their families with them, so that they would be encouraged to return to their countries of origin.[439] This is a typical feature of many of the current time-bound migration schemes and therefore it is important to analyse the Family Reunification Directive and see whether it can accommodate the transnational living of circular migrants and their families from a rights-based perspective. Moreover, this section examines the two directives, which aim to facilitate circular migration: the Blue Card Directive and the Seasonal Workers' Directive.

Therefore, this section aims to assess whether circular migrants can reunite with their family members under the EU law instruments in the field of legal migration. To that end, the study looks into the provisions for the facilitation of family reunification – scope, requirements for the exercise of the right to family reunification, application – and those concerning seasonal workers and "special purpose workers". It also takes as benchmarks the waiting periods, which should not exceed 12 months, as well as the housing conditions (see Annex V). The analysis does not examine which family members can reunite with the sponsor, as well as the possible derogations form the Family Reunification Directive with regards to children, and it focuses mainly on the requirements that need to be fulfilled in order to exercise this right.

5.10.1. Relevant instruments without explicit reference to circular migration

Family Reunification Directive[440]

All liberal democratic states recognise the moral obligation to admit non-citizens who are immediate family members of citizens and residents.[441] Therefore, it is not

439 See Chapter 2 for more details in this regard.

440 Referred in the text as the FRD.

441 J. H. Carens, 'Who Should Get in? The Ethics of Immigration Admissions', *Ethics & International Affairs,* 17/1 (2003), p. 96. See Case C-540/03 - Parliament v. Council, ECLI:EU:C:2006:429.

surprising that the EU, consisting of democratic states sharing the same values, adopted a Family Reunification Directive in 2003. Nonetheless, it took more than three years to reach political agreement on the directive, which required its standards to be decreased to the lowest common denominator.[442] Some of the aspects of the Directive were unsuccessfully challenged by the European Parliament, which was only consulted in relation to the directive, on the basis that the text of the directive breached human rights principles.[443] However, in this case the CJEU underlined that the Family Reunification Directive imposes precise positive obligations on the Member States with corresponding individual rights, and they need to authorise family reunification when the conditions of the Family Reunification Directive are met, without any margin of appreciation.[444]

Family reunification is defined in the directive as "entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry".[445] Therefore, the aim of the Family Reunification Directive is to determine the conditions for the entry and residence for the exercise of the right to family reunification.[446] However, the most important feature of the Family Reunification Directive is that it sets out a general rule for the authorisation of family reunification, according to the ruling of the CJEU in *Chakroun,*[447] and all of the conditions for family reunification, as well as the exceptions and derogations to this general rule, should be regarded as exhaustive and interpreted strictly.[448]

In order to be granted the right to family reunification, the sponsor needs to meet several requirements. According to the Family Reunification Directive, the sponsor is a third-country national who resides lawfully in a Member State and applies or whose family members applies for family reunification in order to be joined with him/her.[449] Article 3 of the Family Reunification Directive stipulates that in order to reunite with family members, sponsors need to hold "a

442 Papagianni, *Institutional and Policy Dynamics of EU Migration Law,* p. 159. However, for the effects of the Directive, see K. Groenendijk, 'Family Reunification as a Right under Community Law', *European Journal of Migration and Law,* 8/12 (2006), pp. 220 - 225.

443 S. Peers, 'Family Reunion', in S. Peers et al. (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 2: EU Immigration Law*, p. 248.

444 Case C-540/03 - Parliament v. Council, ECLI:EU:C:2006:429, Para. 60.

445 Article 2 (d) of the FRD.

446 Article 1 of the FRD.

447 Case C-578/08, Chakroun, ECLI:EU:C:2010:117, Para. 43.

448 S. Peers, 'Family Reunion', in S. Peers et al. (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 2: EU Immigration Law*, p. 249.

449 Article 2 (c) of the FRD.

residence permit issued by a Member State for a period of validity of one year" or have "reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status". The Report on the implementation of the directive showed that most Member States allow migrants who are holders of temporary residence permits to reunite with their family members, but they subject this to a minimum period of residence, which varies among the Member States. [450]

In its Guidelines for the application of Directive 2003/86/EC on the right to family reunification, the Commission stresses that Member States have discretion on how to consider "reasonable probability of obtaining the right of permanent residence".[451] However, it also underlines that "holders of residence permits issued for a specific purpose with a limited validity and that are not renewable cannot, in principle, be considered to have a reasonable prospect of obtaining the right to permanent residence". Thus, the scope of the Family Reunification Directive excludes forms of temporary stay, such as those of temporary or seasonal workers and residence permits that are valid for less than one year.[452]

Even though these are the general rules for family reunification, the Family Reunification Directive permits a number of derogations. When the sponsor is in a polygamous marriage and already has a spouse living with him, the respective Member State must not authorise the family reunification of a further spouse but it has the freedom to decide whether or not to allow the children of further spouses.[453] Article 4 (5) of the Family Reunification Directive allows Member States to require the sponsor and his/her spouse to be of a minimum age, which is typically 21 years-old, before the spouse is able to join him/her. This requirement may *only* be used to ensure better integration and to prevent forced marriages in Member States.[454] The Commission's Guidelines draw an analogy with the *Chakroun* case,[455] stressing that Member States can only require a minimum age *for this purpose* and not in any manner that would undermine the objective of the Family

450 European Commission, Report on the application of Directive 2003/86/EC on the right to family reunification, Brussels, COM (2008) 610 final, 8.10.2008; The latest edition of MIPEX reconfirms this conclusion.

451 European Commission, Communication on guidance for application of Directive 2003/86/EC on the right to family reunification, COM (2014) 210 final, Brussels, 3 April 2014, p. 4.

452 See Article 3 (1) of the FRD.

453 Article 4 (4) of the FRD.

454 European Commission, Communication on guidance for application of Directive 2003/86/EC on the right to family reunification, COM (2014) 210 final, Brussels, 3 April 2014, p.7, emphasis added.

455 Case C-578/08, Chakroun, ECLI:EU:C:2010:117, Para. 43.

Reunification Directive and the effectiveness thereof.[456] The Commission's Report on the implementation of the Directive showed that most of the Member States make use of this optional provision.[457] Moreover, several Member States apply the age threshold. [458]

The applications for family reunification must be submitted and examined when the family members are residing outside the territory of the Member State in which the sponsor resides.[459] Nevertheless, "in appropriate circumstances" Member States can derogate from this rule and also accept applications that have been submitted when the family members are already on the territory of the Member States concerned.[460] Member States have discretion to determine in which situations they will allow for these types of applications. Peers et al. comment that this provision could be interpreted to mean that Member States are not required to always permit in-country applications, yet they are free to set higher standards for family reunification, which do not necessary need to be compatible with the provisions of the Family Reunification Directive.[461] In addition, the Family Reunification Directive does not provide for the payment of family reunification fees. However, the Commission draws an analogy with the case of *Commission v. the Netherlands* on fees for EU long-term residence applications, stating in its Guidance that fees required by Member States should not be excessively high so as to have the effect of hindering family reunification.

In addition, before authorising the entry of family members, Member States have the discretion to impose additional requirements. These conditions concern public policy, public security or public health,[462] "normal" accommodation,[463] sickness

456 European Commission, Communication on guidance for application of Directive 2003/86/EC on the right to family reunification, COM(2014) 210 final, Brussels, 3.4.2014, p.7, emphasis added. For another requirement concerning minimum age, see Articles 5(5) and 17 of the FRD and pp. 7-8 of the Guidelines.

457 European Commission, Report on the application of Directive 2003/86/EC on the right to family reunification, Brussels, COM (2008) 610 final, 8.10.2008, p.5.

458 There are two possible derogations which also apply to children. See Article 4 (1) (d), third paragraph, of the FDR and Article 4 (6) of the FRD. For more details, see S. Peers, 'Family Reunion', in S. Peers et al. (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 2: EU Immigration Law*, p. 254-258.

459 Article 5 (3) of the FRD.

460 Article 5 (3), second paragraph, of the FRD.

461 S. Peers, 'Family Reunion', in S. Peers et al. (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 2: EU Immigration Law*, p. 258.

462 Article 6 of the FRD.

463 Article 7 (1) (a) of the FRD.

insurance,[464] "stable and regular resources"[465] and integration requirements,[466] as well as a waiting period.[467] Following the *Chakroun* judgment, this list of conditions should be interpreted as being exhaustive.[468] This section only focuses on two requirements: the waiting periods and the housing conditions, which together have been adopted as part of the benchmark framework.

With regards to the requirement for the sponsor to have normal accommodation for a comparable family in the same region and which meets the general health and safety standards in force in the Member State, the Guidelines state that its evaluation is left to the discretion of the Member States. However, "the criteria adopted may not be discriminatory and this provision defines the upper limit of what may be required".[469] It also stresses, that the adopted criteria need to be transparent and clearly specified in the national legislation and that "the fulfilment of this requirement may be judged on either the situation of the sponsor at the moment of the application, or on a reasonable prognosis of the accommodation that can be expected to be available when the sponsor will be joined by his/her family member(s)".[470] The Commission gives examples of what evidence can be accepted by Member States, such as a rental or purchase agreement, as well as more flexible evidence, such as conditional rental agreements, which would enter into force after the family reunification takes place.[471]

Member States are also free to impose a waiting period of up to two years of lawful stay before his or her family members can join him.[472] This provision is subject to certain derogations, for example, allowing Member States to retain a three-year waiting period between the submission of an application and the issue of a resident permit to a family member on the basis of national law, if that legislation in force on the date of the adoption of the Family Reunification Directive

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464 Article 7 (1) (b) of the FRD.

465 Article 7 (1) (c) of the FRD. On that article, see Case C-558/14 - Khachab, ECLI:EU:C:2016:285.

466 Article 7 (2) of the FRD. For more details on these additional requirements see, K. Groenendijk, 'Pre-departure Integration Strategies in the European Union: Integration or Immigration Policy?', *European Journal of Migration and Law,* 13/1 (2011).

467 Article 8 of the FRD.

468 S. Peers, 'Family Reunion', in S. Peers et al. (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 2: EU Immigration Law*, p. 259.

469 European Commission, Communication on guidance for application of Directive 2003/86/EC on the right to family reunification, COM (2014) 210 final, Brussels, 3 April 2014, p. 11.

470 European Commission, Communication on guidance for application of Directive 2003/86/EC on the right to family reunification, COM (2014) 210 final, Brussels, 3 April 2014, p.11.

471 European Commission, Communication on guidance for application of Directive 2003/86/EC on the right to family reunification, COM (2014) 210 final, Brussels, 3 April 2014, p.12.

472 Article 8 of the FRD.

took account of Member State's reception capacity.[473] This provision was among the three clauses that was challenged by the European Parliament in the case of *European Parliament v. Council of the European Union*. The CJEU affirmed the validity of this provision and stressed that it did not violate the right to family life.[474] It allows Member States to delay the reunification in accordance with their margin of appreciation, in order to provide for the better integration of family members.[475] If Member States decide to use this option, then they should make an individual case-by-case assessment and they should not impose a general blanket waiting period, as per Article 17 of the Family Reunification Directive.[476] They should also take into consideration the best interests of any minor children.[477]

In its Guidelines, the Commission recommends to Member States to keep those waiting periods as short as possible so as to avoid affecting the right to family life in a disproportionate way.[478] Member States should take into account any "lawful stays" under national law from day one, authorised through residence permits or other title allowing such a legal stay.[479] They can require that the lawful stay is continuous but certain interruptions, such as temporary absences for business trips or visits to the country of origin, should be allowed.[480]

Finally, Member States can reject family reunification applications on the basis of public policy, public security or public health.[481] Yet, they are required to consider the personal circumstances on an individual basis in line with Article 17 of the Family Reunification Directive, as well as the severity or type of offence committed by the family member, or the dangers that emanate from such a person.[482] The provisions in Articles 6 (1) and (2) of the Family Reunification Directive are provisional and thus only specify minimum conditions, which a national norm must fulfil.[483] Once granted or renewed, this reason cannot be used as a ground for withdrawing or refusing to prolong a permit. Recital 14 of the

473 Article 8 of the FRD.
474 Case C-540/03 Parliament v Council, ECLI:EU:C:2006:429, Paras. 97-103.
475 Ibid., Paras. 97-98.
476 European Commission, Communication on guidance for application of Directive 2003/86/EC on the right to family reunification, COM (2014) 210 final, Brussels, 3 April 2014, p. 17.
477 Article 5 (5) of the FRD.
478 European Commission, Communication on guidance for application of Directive 2003/86/EC on the right to family reunification, COM (2014) 210 final, Brussels, 3 April 2014, p. 17.
479 European Commission, Communication on guidance for application of Directive 2003/86/EC on the right to family reunification, COM (2014) 210 final, Brussels, 3 April 2014, p. 17.
480 European Commission, Communication on guidance for application of Directive 2003/86/EC on the right to family reunification, COM (2014) 210 final, Brussels, 3 April 2014, p. 17.
481 Article 6 of the FRD.
482 Article 6 (2), second paragraph, of the FRD.
483 Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law,* p. 409.

Preamble to the Family Reunification Directive clarifies the meaning of the notion of "public policy", which should be understood to cover a conviction for committing a serious crime, as only one possible example.[484] The terms "public policy and public security" also includes cases when "third country national belongs to an association which supports terrorism, supports such an association or has extremist aspirations".[485]

5.10.2. Legal instruments aimed at facilitation of circular migration

Blue Card Directive

The Preamble to the Blue Card Directive states that favourable conditions for family reunification are a "fundamental element" of the directive and it provides certain derogations to the Family Reunification Directive.[486] Thus, Blue Card holders are not only entitled to family reunification, but they have facilitated access thereto. They are not subject to the requirement to have a reasonable prospect of obtaining the right to permanent residence and a minimum period of residence.[487] Member States are required to grant residence permits for family members when the conditions for family reunification are met, and at the very latest this should be done within six months from the date on which the application was lodged, which is shorter than the maximum term.[488] The period of validity of their residence permit should match that of the Blue Card holder, if their travel documents allow for it, compared to the one year limit that is contained in the Family Reunification Directive.[489] The family members of Blue Card holders are not subject to any time limits regarding labour market access. [490] Finally, the integration conditions that

484 K. Hailbronner, C. Arevalo, and T. Klarmann, 'Family Reunification Directive 2003/86/EC', in K. Hailbronner and D. Thym (eds.), *EU Immigration and Asylum Law. A Commentary* (Second edn.: C. H. Beck /Hart/ Nomos 2016), p. 359.

485 There are different views in relation to the interpretation of this condition. Some scholars and the Commission argue that, even though there is no reference to the EU free movement law rules covering EU citizens and their family members, these provisions should be treated equally. See H. Oosterom-Staples, 'The Family Reunification Directive: A Tool Preserving Member State Interest or Conducive to Family Unity?', in A. Baldaccini, E. Guild, and H. Toner (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Hart Publishing, 2007), p. 451, p. 482. European Commission, COM (2014) 210 final, Brussels, 3.4.2014, p. 11. For the opposite view, see Hailbronner, Arevalo, and Klarmann, 'Family Reunification Directive 2003/86/EC', pp. 360- 361.

486 Recital 23 of the Preamble to the BCD.

487 Article 15 (2) of the BCD, derogating from Articles 3 (1) and 8 of the FRD.

488 Article 15 (4) of the BCD, derogating from the first subparagraph of Article 5(4) of the FRD.

489 Article 15 (5) of the FRD.

490 Article 15 (6) of the BCD, derogating from the second sentence of Article 14(2) of the FRD.

are provided for in the Family Reunification Directive "may only be applied after the persons concerned have been granted family reunification".[491]

The proposal for a new Blue Card Directive further facilitates the conditions for family reunification. A new element is the possibility to submit family reunification applications together with a Blue Card application. Where the conditions for family reunification are met, residence permits for family members would be granted at the same time as the EU Blue Card.[492] The period for granting the residence permits to family members, where the application is filed after obtaining the Blue Card permit, is to be shortened from six to two months.[493] In addition, the rights of family members are strengthened even further, thereby giving them access to any employed and self-employed activity without restriction.[494] However, Member States can still apply a labour market test before granting access to the labour market.[495]

Seasonal Workers' Directive

Neither the proposal of the Commission and its accompanying impact assessment, nor the final text of the Seasonal Workers' Directive provide any right to family reunification.[496] Furthermore, this right was barely discussed during the negotiations,[497] with Sweden being the only Member State in favour of providing a possibility for family members of seasonal workers to "be able to company them".[498] In addition, the European Parliament did not support this right because it was common knowledge that this would block the adoption of the Seasonal Workers' Directive.[499] According to Wiesbrock et al., apart from the temporary nature of the seasonal work, this limitation to the right to family reunification can be attributed to the efforts undertaken by governments to prevent migrants from overstaying and to ensure that their temporary stays do not become permanent.[500]

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491 Article 15 (3) of the BCD, derogating from the last subparagraph of Article 4(1) and Article 7(2) of the FRD.
492 Article 16 (4) of the Proposal for a Recast BCD.
493 Article 16 (4) of the Proposal for a Recast BCD.
494 Article 16 (6) of the Proposal for a Recast BCD.
495 Article 16 (6), second paragraph, of the Proposal for a Recast BCD.
496 See Recital 46 of the Preamble to the SWD.
497 See Fridriksdottir, *What Happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in Europan Union Law on Labour Migration,* pp. 218-219.
498 Council of the European Union, Outcome of Proceedings of Working Party on Integration, Migration and Expulsion, 29 September 2010, 13693/10, p.3.
499 Fridriksdottir, *What Happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in Europan Union Law on Labour Migration,* p. 219.
500 Wiesbrock, Jöst, and Desmond, 'Seasonal Workers Directive 2014/36/EU', p. 970.

5.10.3. Instruments that contain some circular migration elements

Intra-corporate Transferees' Directive

Family members also enjoy facilitated access to family reunification, as Blue Card holders are entitled to rely on derogations to the Family Reunification Directive. They are not required to have reasonable prospects of obtaining the right to permanent residence and a minimum period of residence; the integration conditions can be imposed after the family members have been granted a family reunification permit; if the conditions for family reunification are fulfilled, residence permits for family members should be granted within 90 days from the date on which the complete application was lodged, which is more favourable than what is provided for under the current Blue Card Directive. The permits for family members have the same validity as those which are issues to intra-corporate transferees. Finally, the family members of the intra-corporate transferee who have been granted family reunification are entitled to access employment and self-employed activity in the Member State which issued the family member residence permit.[501]

Students' and Researchers' Directive

One of the big changes that the Students' and Researchers' Directive brought about was explicitly providing for a right to family reunification. Article 26 of the Students' and Researchers' Directive provides the same rights to family members of researchers as to family members of ICTs.[502]

5.11. Assessment

The Family Reunification Directive goes further than the universal human rights instruments and the case law of the ECtHR, and stipulates a right to entry and residence for nuclear family members.[503] However, some of the provisions of the Family Reunification Directive allow Member States to go below the minimum standards that are contained in Article 8 ECHR.[504] Furthermore, it reserves this

501 Article 19 of the ICTD.

502 See above.

503 S. Peers, 'Family Reunion', in S. Peers et al. (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 2: EU Immigration Law*, p. 248.; K. Groenendijk, 'Recent Developments in EU Law on Migration: The Legislative Patchwork and the Court's Approach', *European Journal of Migration and Law*, 16 (2014), p. 331.

504 For more, details see K. Groenendijk, 'Family Reunification as a Right under Community Law', *European Journal of Migration and Law,* 8/12 (2006), p. 218-220.

right only for migrants who, according to the Member States, have the prospect of settling on the basis of a permanent residence permit. Therefore, the Family Reunification Directive excludes temporary and seasonal migrants, whose permits are for a specific purpose, with a limited validity of less than one year and which are not renewable. This means that the benchmark on family reunification of seasonal workers and "special purpose workers" in this policy area is not fulfilled (see Annex V).

The Family Reunification Directive allows Member States to impose additional conditions before authorising family reunification, among which are "normal accommodation requirements" and a waiting period. The aim of this requirement is to ensure adequate accommodation for the family and the criteria assessed by the Member States should not be stricter than for a comparable family living in the same region, in line with the benchmark on accommodation in this policy area.[505] Concerning the waiting period, Member States have discretion to impose such conditions, requiring up to a three-year lawful stay in some cases, before family reunification is authorised.[506] Even if circular migrants have a permit that is not excluded from the scope of the Family Reunification Directive, this requirement can seriously hinder the family life of migrants if it is too lengthy. Therefore the benchmark on waiting periods in this policy area sets the limit to up to 12 months. It is positive that the Commissions allows interruption to residence periods, such as temporary absences for business trips or visits to the country of origin, which can be an inherent part of the circular migrant's trajectory.[507]

The question of how easy or hard it is to reunite with the family depends very much on the category in which the migrant fits and in which Member States he or she wants to reunite with the rest of his or her family members. Blue Card holders, ICTs and researchers are definitely the categories that have the most facilitated access on the basis of the derogations to the Family Reunification Directive. They are exempted from the requirement to have reasonable prospects of obtaining the right to permanent residence and from having to complete a waiting period.

505 European Commission, Communication on guidance for application of Directive 2003/86/EC on the right to family reunification, COM (2014) 210 final, Brussels, 3 April 2014, p. 11.

506 However, it should be stressed that only Austria can make use of the exception in Article 8 (2) of the directive. For more details, see European Commission, Report on the application of Directive 2003/86/EC on the right to family reunification, Brussels, COM (2008) 610 final, 8.10.2008, p.8.

507 European Commission, Communication on guidance for application of Directive 2003/86/EC on the right to family reunification, COM (2014) 210 final, Brussels, 3 April 2014, p. 17.

Comparing the requirements for different categories of migrant workers, it becomes evident that the facilitation of family reunification depends very much on the migrants' skill level. All highly-skilled categories, depending on their contracts, could enter and stay on temporary permits, which means that the temporary stay is not the leading factor when granting this right. Despite the fact that seasonal work concerns a temporary stay, these workers are the only category of migrant workers that are excluded from the scope of the Family Reunification Directive and the right to family reunion, along with other temporary permits that have been issued under national law. The EU's family reunification policy unfortunately confirms the trend of providing rights-based circular migration solutions only in relation to highly-skilled migrants. Therefore the benchmark on obligations to facilitate family reunion can only be considered to be partially fulfilled (see Annex V).

5.12. Recognition of qualifications

Another policy area that can influence the willingness of circular migrants to engage in this type of migration is the recognition of qualifications. As was already mentioned, the "triple win" proponents claim that it enables skill transfer back to the countries of origin, which in turn supports development. Nonetheless, some evaluations of circular migration schemes stress that there are cases when migrants return home and their new skills cannot be recognised or are not needed.[508] Therefore, this policy area is considered an important area for the purposes of this research.

The benchmarks in this policy area focus on the availability of provisions on the recognition of occupational qualifications that have been acquired outside the EU, including certificates and diplomas, and other means for the recognition of professional qualifications (see Annex V). Among the instruments that can implement these benchmarks are international cooperation instruments and active information policy in relation to the recognition of academic qualifications, which would make circular migration beneficial for the circular migrant and would support both skill and knowledge transfer.[509] The recognition of academic qualifications in the EU is governed by the Convention on the Recognition of Qualifications

508 K. Hooper and M. Sumption, 'Reaching a "Fair" Deal on Talent. Emigration, Circulation and Human Capital in Countries of Origin', Washington DC: Migration Policy Institute (2016), pp. 20-21.

509 Z. Vankova, 'EU Circular Migration Policies: Dead or Alive? Developing a Rights-based Benchmark Framework for Policy Assessment', *Journal of Immigration, Asylum and Nationality Law*, 30/4 (2016).

concerning Higher Education in the European Region, which was discussed in Chapter 3. Therefore it is not discussed any further in this section.

As was discussed in Chapter 3, Directive 2005/36/EC facilitates the mutual recognition of professional qualifications at EU level. Certain categories of third-country nationals can also benefit from rights in this respect under the specific EU labour migration directives. The directives under consideration in this study, such as the Single Permit Directive, the Seasonal Workers' Directive, the Researchers' Directive, the Blue Card Directive and the Intra-corporate Transferees' Directive, all provide for equal treatment with nationals in relation to the "recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures".[510]

5.12.1. Legal instruments aimed at facilitation of circular migration

Article 14 (1) (d) of the Blue Card Directive provides for the equal treatment of Blue Card holders in relation to the recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures. Recital 19 of the Preamble to the Blue Card Directives provides further details: professional qualifications acquired by a third-country national in another Member State should be recognised in the same way as those of EU citizens. Furthermore, qualifications that have been acquired in a third country should be taken into account in conformity with Directive 2005/36/EC.[511] In addition, the deadline for examining the application for an EU Blue Card should not include the time required for the recognition of professional qualifications, if so required.[512] The proposal for a new Blue Card Directive envisages a requirement for the Member States "to recognise professional experience as an alternative to education qualifications". [513] There is also a new requirement for the Member States to facilitate the validation and recognition of documents which attest the relevant higher professional qualifications for unregulated professions.[514] The Seasonal Workers' Directive only contains the standard equal treatment clause on the recognition of qualifications in Article 23 (1)(h) thereof.

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510 Article 23 (1)(h) of the SWD, Article 12 (1) (d) of the SRD, Article 14 (1) (d) of the BCD, Article 18 (2) (b) of the ICTD, Article 12 (1) (d) of the SPD.
511 Recital 19 of the Preamble to the BCD.
512 Recital 12 of the Preamble to the BCD.
513 See BCD Recast Proposal, p. 13 and Article 2 (g) thereof.
514 Article 5 (6) of the BCD Recast Proposal.

5.12.2. Instruments that contain some circular migration elements

ICTs enjoy equal treatment with nationals of the Member State where the work is carried out in relation to the recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures.[515] Researchers also benefit from the equal treatment clause that is contained in the Single Permit Directive.[516]

5.12.3. Relevant instruments without explicit reference to circular migration

The equal treatment clause that is contained in the Single Permit Directive also covers the recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures in Article 12 (1) (d) thereof. Recital 23 of the Preamble to the Single Permit Directive provides more information in this regard, stating that Member States should recognise professional qualifications that have been acquired by third-country nationals in another Member State in the same way as those of EU citizens and should take into account any qualifications that have been acquired in a third country in accordance with Directive 2005/36/EC. Therefore, if migrant workers are admitted for the first time to the EU and possess a qualification from a third country, they can have this recognised on the basis of national law. If migrant workers have a prior EU qualification, they can benefit from the recognition procedures that are contained in Directive 2005/36/EC.

5.13. Assessment

The equal treatment provisions in these directives mean that the different categories of migrants can benefit from the existing national procedures. Despite the existence of EU instruments in this field, research shows that the recognition systems continue to differ depending on which country is in charge of the recognition procedure.[517] There are a variety of definitions of regulated and non-regulated professions, various types of recognition procedures and methods of assessment that are appli-

515 Article 18 (2) (b) of the ICTD.
516 Article 12 (1) (d) of the SRD.
517 International Organization for Migration (2013): Recognition of Qualifications and Competences of Migrants, p. 22.

cable in each case. According to MIPEX, procedures to recognise skills and foreign qualifications are in general very new and they are only facilitated in some countries.[518] This plethora of different instruments can hinder access to the labour market and the use of migrants' qualifications obtained in their home countries, and thus it can impede circularity.[519] Therefore, in order to assess what these equal treatment clauses mean in practice and what the provisions and measures available to circular migrants are, one should analyse the national law provisions to gain further insight. This is done in the two subsequent chapters on Bulgaria and Poland respectively.

5.14. Conclusions to Chapter 5

The analysis in this chapter has demonstrated that circular migration has a rather marginal role in the EU labour migration legal instruments. This is in contrast with the EU policy documents adopted by the European Commission which serve as the basis for the development of EU's approach to circular migration. Nevertheless, two main policy concepts of circular migration can be outlined in the EU's labour migration policy. On the one hand, a spontaneous pattern of circularity that can be facilitated through a legislative framework, such as in the context of the Blue Card Directive, and on the other hand, a temporary migration scheme with a re-entry component that is regulated through the Seasonal Workers' Directive, and to some extent, the ICT Directive. These two policy approaches underline the unequal treatment between the different categories of migrant workers.

This chapter shows that rights-based circular migration is reserved for highly-skilled migrants, which the EU wants to attract. The most desirable category of migrants – the Blue Card holders – benefit from migrant-led trajectories and are given the opportunity to settle according to the EU's policy on labour migration. Furthermore, Blue Card holders are the only category of migrants with the explicitly provided right to switch employer and remain unemployed for up to three months, without the risk of losing their permits. Despite that, even this desired category of migrants do not have facilitated entry to the EU.

Seasonal workers and ICTs, on the other hand, are admitted for a limited period of time and are provided with the possibility to re-enter on the basis of different

518 Nine countries assessed with MIPEX: AU, CA, CY, DE, EE, IS, NL, SE, UK. See more at: http://www.mipex.eu/labour-market-mobility

519 See International Organization for Migration (2013): Recognition of Qualifications and Competences of Migrants.

conditions. They do not benefit from migrant-led trajectories and the high protection of rights that is guaranteed to Blue Card holders. For instance, seasonal workers are not entitled to family reunification and neither category has access to obtaining an EU long-term residence permit, which is not in line with the benchmarks of the study based on international and European standards (see Annex V). Furthermore, the Seasonal Workers' Directive does not address employer-organised accommodation, which could lead to abuse and dependency of this category of workers. The analysis also demonstrates that researchers, who are considered to be a mobile group, do not benefit from any special provisions in relation to the facilitation of circular migration.

Despite the equal treatment clauses concerning social security coordination, the possibility to export social benefits depends, to a large extent, on national provisions and the existing bilateral agreements that have been signed between Member States and third countries. The same applies to the equal treatment provisions regarding recognition of qualifications, which need to be examined through analysis of national law.

This chapter, in combination with Chapter 4, presenting the policy route for the facilitation of circular migration within the context of the GAMM, serves as a basis for the analysis of the implementation of circular migration policies at the national level, which in turn looks into how these EU law provisions have been transposed and what, if any, type of circular migration they support.

CHAPTER 6:

Implementation of the EU's approach to circular migration at the national level - the case of Poland

6.1. Introduction

This chapter examines the implementation of the EU's approach to circular migration that is found in Polish legislation and policy and its consequences on the rights of migrant workers coming to Poland from the Eastern Partnership countries.[1] It firstly presents the historical context and then it moves on to explore the policy and legal developments in the field of migration in Poland's pre and post-accession periods respectively. It then subsequently focus on the existing EU and national instruments in the policy areas that need to be addressed with regard to circular migration: entry and re-entry conditions, work authorisation and residence status, social security coordination, entry conditions for family members and recognition of qualifications. Thirdly, it analyses the implementation of these instruments by providing the migrants' perspective on their use and the perceived challenges related to circular migration on the basis of empirical data that was gathered through five focus groups consisting of migrant workers and Blue Card holders. The data from the focus groups is further supplemented with interviews that were conducted with relevant stakeholders in order to provide a comprehensive analysis of the circular migration issues at the individual level, especially in those policy areas where the data derived from the focus group were not detailed enough, such as in the ambit of social security coordination and the recognition of qualifications. Finally, every policy area that is analysed in this chapter concludes with an assessment on the basis of the developed rights-based framework for analysis.

1 The research in this Chapter covers the period up to November 2017. There were important pending amendments that occurred after this period. The most important ones are mentioned in footnotes.

6.2. Historical context

Migration dynamics until 1989

Two years stand out as turning points in Poland's recent migration history: 1989, which marked the fall of communism and thus the opening of the Polish borders and 2004, marking Poland's accession to the EU and the beginning of a new wave of Polish labour emigration and steady immigration inflows.[2] The post-war changes to the Polish borders caused the displacement of various ethnic groups and thus intensive inward and outward movements between 1945-1956.[3] This period saw the intensive emigration of ethnic Germans, as well as ethnic Ukrainians and Jews, as well as the immigration and repatriation of ethnic Poles and Jews on the basis of the bilateral agreements that were concluded in 1945.[4]

The period of communist rule in Poland (1945-1989) was generally characterised by the lack of an immigration policy; international travel and emigration were strictly controlled by the discretion of the ruling elites.[5] The established migration pattern after 1956 reflected these restrictive policies: almost no immigration and very limited emigration.[6] The only valid reason for emigration was for the purposes of family reunification, even though there was no guarantee that the responsible authority would issue a passport.[7] Emigration decisions by individuals were subject to the approval of the Ministry of Internal Affairs. Furthermore, the procedures for issuing a passport with an "exit visa" were burdensome and time-consuming, which had the effect of seriously hindering international travel in general.[8]

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2 E. Kepinska and M. Kindler, 'Poland', in A. Triandafyllidou and R. Gropas (eds.), *European Immigration: A Sourcebook* (2nd edn.: Ashgate 2014), p. 273.

3 M. Okolski, 'Poland's Population and Population Movements: An Overview', in T. Frejka, M. Okolski, and K. Sword (eds.), *In-depth studies on migration in Central and Eastern Europe: the case of Poland* (Economic Studies, 11; New York: United Nations Economic Commission for Europe, 1998), p. 15.

4 Ibid.

5 M. Okolski, 'General introduction', in I. Grabowska-Lusinska et al. (eds.), *Immigration to Poland: Policy, Employment, Integration* (Warszawa: Wydawnictwo Naukowe Scholar, 2010), p. 18; Okolski, 'Poland's Population and Population Movements: An Overview'.

6 Okolski, 'Poland's Population and Population Movements: An Overview', p. 15.

7 P. Korcelli, 'Emigration from Poland after 1945', in H. Fassmann and R. Münz (eds.), *European migration in the late twentieth century. Historical patterns, actual trends, and social implications* (Hants: Edward Elgar Publishing 1994), p. 174.

8 Ibid.

In the period following 1950, only two to three thousand immigrants were recorded as entering Poland each year.[9] These were mainly repatriated Polish citizens who were former emigrants and spouses of Polish citizens who originated from other communist countries like the USSR, Bulgaria or Vietnam.[10] There were also several cases of pro-communist asylum seekers who settled in Poland, the most notable of which were the Greek exiles.[11] International tourism was also heavily controlled with foreigners mainly coming from other communist countries until the liberalisation that followed in the 1970s.[12]

Foreign workers, who were admitted on an exceptional basis, served primarily as guest workers or staff members of subcontracting companies, mainly within the framework of the Council for Mutual Economic Assistance[13] (COMECON).[14] This exchange of foreign labour was very limited in its scale compared to the guest workers inflow that was present in Western Europe.[15] The cooperation between the states in the Eastern bloc began in the post-war era on the basis of bilateral agreements for the exchange of foreign workers.[16] By the end of the 1960s, this cooperation intensified and the COMECON members signed various bilateral agreements covering a range of different forms of employment: temporary employment within the scope of minor border traffic (border commuters), time-limited employment for graduate professionals or occupationally trained workers, temporary employment for the constructions of gas and oil pipelines and other such projects.[17]

9 Okolski, 'General introduction', p. 24; Okolski, 'Poland's Population and Population Movements: An Overview', p. 15.
10 Okolski, 'General introduction', p. 24.
11 Ibid.
12 Okolski, 'Poland's Population and Population Movements: An Overview', p. 15.
13 The Council for Mutual Economic Assistance was an economic organization from 1949 to 1991 under the leadership of the Soviet Union that comprised the countries of the Eastern Bloc along with a number of communist states elsewhere in the world. Source: Wikipedia (accessed 15 March 2017).
14 K. Iglicka, *Poland's Post War Dynamic of Migration* (Research in Migration and Ethnic Relations Series Ashgate 2001), p. 4.
15 F. Levcik, 'Migration and Employment of Foreign Workers in Comecon Countries and Their Problems', *Eastern European Economics* 16 /1 (1977), p. 12. See also M. A. Light, 'What Does It Mean to Control Migration? Soviet Mobility Policies in Comparative Perspective', *Law & Social Inquiry* 37/2 (2012), p. 402.
16 Levcik, 'Migration and Employment of Foreign Workers in Comecon Countries and Their Problems', p. 11.
17 Ibid., p. 12, p. 15, p. 17.

Unlike international migration, internal spatial mobility in Poland was the major human mobility up until the 1960s.[18] This kind of internal migration is a typical feature of modernising societies, consisting of relatively long-distance outflows from rural areas to cities.[19] In the early 1960s, the internal migration slowed down and was replaced by a gradual increase in internal circulation from rural areas to cities and back, which by the mid-1970s "spilled over state borders".[20] This "metamorphosis" phenomenon has been described as "incomplete migration".[21] As a result of a slowdown in the process of industrialisation, employment opportunities in Poland began to decrease.[22] At the same time, at the beginning of the 1970s, the Polish authorities simplified the procedures for issuing passports, which consequently led to the liberalisation of international travel.[23] Furthermore, from 1974 Polish citizens could travel to other socialist countries and only had to produce their national IDs to enter therein. [24]

All these favourable factors were conducive to an in increase in international circulation, largely involving former domestic commuters.[25] The malfunctioning of the centrally planned economy thus made it very profitable to travel abroad. Poles engaged in two distinct types of movement: tourist trips and circular labour migration.[26] Notwithstanding the reasons for the short-term travels abroad, they usually involved attempts to benefit financially upon their return to Poland through petty trade or even through the saving of per-diem allowances when the trip was carried out under the guise of tourism.[27] Thus, a new category of petty traders emerged, engaged in what is referred to as pendular migration.[28] Those who spent longer periods abroad were usually employed, for instance on the basis of the

18 M. Okolski, 'The transformation of spatial mobility and new forms of international population movements: Incomplete migration in Central and Eastern Europe', in J. W. Dacyl (ed.), *Challenges of Cultural Diversity in Europe* (Stockholm: CEIFO, 2001), p. 72

19 Ibid., p. 72.

20 Ibid., pp. 72-73.

21 The concept has been developed by Marek Okolski. The most detailed theoretical presentation, according to him can be found in ibid. See also M. Okolski, 'Spatial Mobility from the Perspective of the Incomplete Migration Concept', *Central and Eastern European Migration Review,* 1/1 (2012).

22 Okolski, 'The transformation of spatial mobility and new forms of international population movements: Incomplete migration in Central and Eastern Europe', p. 80.

23 Okolski, 'Spatial Mobility from the Perspective of the Incomplete Migration Concept', p. 20.

24 Ibid.

25 Ibid., p. 80. For more detailed summary of the push factors, see ibid., pp. 20-21.

26 Ibid., p. 22.

27 Ibid.

28 Ibid., p. 23. See also M. Morokvasic, 'Une migration pendulaire: les Polonais en Allemagne', *Hommes et Migrations* 1155/1 (1992).

bilateral agreements signed with other countries for the recruitment of Polish workers.[29]

As a result of the beginning of *perestroika* in Moscow, Polish communists started to remove restrictions on exit and gradually the control over the outflows ceased to exist.[30] Therefore, the period 1980-1989 was marked by mass emigration for settlement, very often by whole families due to the changing political context and the dissatisfaction with "real socialism".[31]

Migration dynamics after 1989

The opening of the borders of the former Eastern bloc countries and the disintegration of the former Soviet Union and Yugoslavia had the effect of changing migration patterns in the region.[32] The defeat of the communist coalition at the June 1989 elections, which was replaced by a Solidarity-led government, brought about a full liberalisation of Poland's migration policy.[33] The transition to democracy and the rule of law removed the political push factors, which fuelled the high emigration rate that was present in the 1980s.[34] As this type of migration declined in the early 90s, the circular labour migration intensified and exceeded emigration for settlement.[35] The large volume and intensification of this type of migration was caused by the abolition of tourist visa regimes for Polish citizens in Western Europe. Furthermore, the natural migrant networks created by the *Aussiedler* from Poland or the refugees form the *Solidarność* exodus facilitated access to the informal labour markets for circular petty traders in countries like Germany, Austria and Italy.[36]

Along with other Central European countries, Poland experienced a new population phenomena: massive spatial mobility of citizens of the former USSR, labour migration from both Eastern and Western Europe, permanent immigration from mainly Eastern neighbours, the formation of new immigrant communities and

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29 Okolski, 'Spatial Mobility from the Perspective of the Incomplete Migration Concept', pp. 20-21.

30 D. Stola, 'Poland as a Migration Middle Zone at the EU Eastern Border', in K. Hakola (ed.), *Migration and Refugee Policy on the Eastern Border of the European Union* (University of Jyväskylä, 1998), p. 84.

31 Ibid., p. 85.

32 F. Laczko, I. Stacher, and J. Graf, 'Migration in Central and Eastern Europe. 1999 Review', (1999), p. 18.

33 Okolski, 'Poland's Population and Population Movements: An Overview', p. 20

34 Stola, 'Poland as a Migration Middle Zone at the EU Eastern Border', p. 85.

35 Okolski, 'Spatial Mobility from the Perspective of the Incomplete Migration Concept', p. 23. See also Stola, 'Poland as a Migration Middle Zone at the EU Eastern Border', p. 85. See also Korcelli, 'Emigration from Poland after 1945', pp. 122-123.

36 Okolski, 'Spatial Mobility from the Perspective of the Incomplete Migration Concept', p. 23.

the return of Polish emigrants.[37] The first population census that was carried out in Poland's post-war history revealed that Poland had become a country that was host to thousands of immigrants[38] and although the migration balance was still negative, the gap between immigration and emigration flows was narrowing.[39] According to its results, in 2002 there were 49 200 foreign nationals residing in Poland, covering both permanent residents and temporary residents, that is those that were residing in Poland for more than one year at the time of the census.[40] Most of them came from former Soviet countries: Ukraine (20%), the Russian Federation (9%), Belarus (6%) and Armenia (3%).[41] The other countries of origin with large representation included Germany (8%), the USA (4%) and Vietnam (3%). According to the census results in 2002, 40 500 of these foreigners were legally working on the Polish territory. [42] On the other hand, in the period from 1989-2002, the census data showed that 85 500 people migrated or returned from abroad to Poland, but only 14 500 (17%) of the total were foreigners that did not possess Polish citizenship and who subsequently became permanent residents of Poland during this period.[43] The rest were Polish returnees with multiple citizenships.[44]

The 1990s also brought about changes to the Polish market, which saw Poland become an attractive place to both sell and buy various goods, as well as to seek employment.[45] In addition, the low costs to enter Poland due to geographical and linguistic proximity, and the visa-free regime, contributed to the development of "commercial mobility". [46] Initially, Russians, Belarusians and Ukrainians would come to Poland to sell different goods on the Polish market, but after few years the patterns reversed.[47] Gradually the circular mobility of Poles changed character and remained the main occupation of people from the border regions, known as the so-called "*mrówki*".[48] As Okolski notes, in the 1990s the Ukrainians became the largest immigrant group involved in incomplete migration.[49] Most of their

37 Iglicka, *Poland's Post War Dynamic of Migration*, p. 5. K. Iglicka, 'Poland', in A. Triandafyllidou and R. Gropas (eds.), *European Immigration: A Sourcebook* (1st edn.: Ashgate 2007), p. 263.
38 Iglicka, 'Poland', p. 265.
39 Iglicka, *Poland's Post War Dynamic of Migration*, p. 8.
40 OECD, 'Trends in International Migration: SOPEMI 2009 Edition', (2010), p. 250
41 Ibid., p. 252.
42 Iglicka, 'Poland', p. 266.
43 Ibid., p. 267.
44 See Korcelli, 'Emigration from Poland after 1945', p. 122.
45 Stola, 'Poland as a Migration Middle Zone at the EU Eastern Border', p. 88.
46 Ibid.
47 Ibid.
48 Okolski, 'Spatial Mobility from the Perspective of the Incomplete Migration Concept', p. 24.
49 Okolski, 'The transformation of spatial mobility and new forms of international population movements: Incomplete migration in Central and Eastern Europe', p. 97.

trips were made under the guise of tourism.[50] Over the course of time, however, the line between cross-border mobility and labour migration became somewhat vague. [51] Ukrainians started to gradually dominate certain types of jobs and occupations, such as those in the areas of horticulture, housekeeping and construction, which were the least attractive employment niches for Polish citizens.[52] Their migration was facilitated through the developed migrant networks of relatives and friends, as well as the spontaneous cross-border transportation service carried out by shuttle buses between Ukraine and Poland.[53]

6.3. Migration policy framework of Poland

6.3.1. Pre-accession period: 1989 – 2004

The Polish immigration policy was "virtually non-existent in the late 1980s" and it only slowly started to dominate the government's legislative agenda at the beginning of Poland's transition to democracy.[54] Therefore, this period is a logical point of departure for the analysis of Polish migration laws and policies. The formation of the Polish immigration policy in the early 1990s occurred in a context that was influenced by the process of Europeanisation,[55] and further characterised by policy transfer and policy learning through various channels.[56] Thus, an analysis of the Polish immigration policies would be incomplete if it were not to consider this process and the outcomes thereof.

At the genesis of Poland's transition to democracy, the only legislative act in the field of migration was the "inherited" Foreigners Act of 1963, which was

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50 Ibid., p. 99.

51 Stola, 'Poland as a Migration Middle Zone at the EU Eastern Border', p. 88.

52 Okolski, 'The transformation of spatial mobility and new forms of international population movements: Incomplete migration in Central and Eastern Europe', p. 102.

53 Ibid.

54 A. Kicinger, A. Weinar, and A. Gorny, 'Advanced yet Uneven: the Europeanization of Polish Immigration Policy', in T. Faist and A. Ette (eds.), *The Europeanization of National Policies and Politics of Immigration: Between Autonomy and the European Union* (Palgrave Macmillan, 2007), p. 181.

55 In this study Europeanisation is understood as meaning spread of forms of life, production, habits and also political principles, institutions and identities from Europe to other territories. See J.Olsen, 'The Many Faces of Europeanization', *Journal of Common Market Studies* 5 (2002), p. 937.

56 A. Kicinger, A. Weinar, and A. Gorny, 'Advanced yet Uneven: the Europeanization of Polish Immigration Policy', in T. Faist and A. Ette (eds.), *The Europeanization of National Policies and Politics of Immigration: Between Autonomy and the European Union* (Palgrave Macmillan, 2007), p. 181. See also M. Pawlak, 'Research-Policy Dialogues in Poland', in P. Scholten et al. (eds.), *Integrating Immigrants in Europe: Research-Policy Dialogues* (IMISCOE Research Series: Springer International Publishing, 2015).

clearly outdated, especially when one considers the new migratory context after the opening of Poland's borders.[57] In the first half of the 1990s, the main policy efforts were focused on establishing border control at all frontiers, the signing of readmission agreements with the Schengen and neighbouring states, laying the legal and institutional foundations for a national asylum system and maintaining non-visa regimes with all European states, including the CIS.[58]

This period was also marked by Poland's' accession to the Council of Europe in 1991, as well as the ratification of the European Convention on the Protection of Human Rights and Fundamental Freedoms in 1993, which had direct implications for Poland's future migration policies.[59] In 1997, Poland also ratified the European Social Charter but did not accede to the European Convention of Migrant Workers of 1977.[60] In addition, the country did not accede to the ILO Migration and Employment Convention (No.97), ILO Migrant Workers Convention (No. 143) or the ICRMW.[61]

Poland started to participate in different international cooperation fora on migration between the East and West, such as the Budapest Process and the Vienna Process, as well as participating in meetings with EU officials and cooperating in twining projects, which facilitated the diffusion of norms and policy learning.[62]

The adoption of the Act on Employment in December 1989 was among the first policy developments in the field of migration.[63] Due to the high levels of unemployment after 1989, its aim was to establish restrictive regulations in order to limit the access of foreign citizens to the Polish labour market.[64] Employers had to apply for work permits for the migrant workers, which were issued by the regional labour office on the basis of a labour market test. 1994 saw the adoption of the Act on Employment and Counteracting Unemployment, which introduced a two-step

57 E. Kepinska and D. Stola, 'Migration Policy and Politics in Poland', in A. Gorny and P. Ruspini (eds.), *Migration in the New Europe* (Palgrave Macmillan 2004), p. 164. Iglicka, 'Poland', p. 264.
58 Iglicka, 'Poland', p. 264. Kicinger, Weinar, and Gorny, 'Advanced yet Uneven: the Europeanization of Polish Immigration Policy', p. 185.
59 Kepinska and Stola, 'Migration Policy and Politics in Poland', p. 163.
60 Ibid., p. 164, p. 174.
61 For the full list of the international instruments that Poland has ratified, see the footnotes on ratifications in sections 3.2. and 3.3 of Chapter 3.
62 Kicinger, Weinar, and Gorny, 'Advanced yet Uneven: the Europeanization of Polish Immigration Policy', p. 183.
63 M. Lesinska et al., 'Migration Policy in Poland and its impact on the inflows and settlement of immigrants', in I. Grabowska-Lusinska et al. (eds.), *Immigration to Poland: Policy, Employment, Integration* (Warszawa: Wydawnictwo Naukowe Scholar, 2010), p. 67.
64 Ibid., p. 67

work permit procedure.[65] Throughout the following years, the work permit system continued to become more and more restrictive and it became longer and costlier, which resulted in a low number of foreigners legally working in Poland. [66]

Preparation on a new Foreigners Act already started at the beginning of the transition period, but it was only adopted in September 1997.[67] The law reflected the Europeanisation process and therefore contained EU-inspired solutions, as well as emerging national interests, that concentrated primarily on security issues.[68] It focused mainly on improving the control of the migration processes and limiting the number of 'undesired' individuals, by setting out provisions on the conditions of entry, stay and transit through Poland.[69] Clearly influenced by the Western regulations, the law provided for a temporary residence permit along with the existing permanent residence permit that was present in Polish law.[70] Another result of the started Europeanisation process was the introduction of provisions that were required by the Schengen *acquis*.[71] The Act also regulated the issue of repatriation visas and enacted rules for the recognition of those of Polish origin, as a result of the official decision of the government to facilitate resettlement of this category of foreigners form the former Soviet Union.[72] The repatriated foreigners were granted Polish citizenship upon their arrival in Poland.

The year 1997 also marked the adoption of a new national Constitution,[73] which covered fundamental issues, such as the right to leave the country (Article 52.2), the right to asylum and refugee status (Article 56), the main rules for the acquisition of the Polish nationality (Article 34) and the right to settle in Poland for foreigners of Polish origin (Article 52.5).[74] The newly adopted Constitution also introduced the principle that foreigners enjoyed equal rights with nationals and

65 E. Kepinska, 'SOPEMI Report for Poland', Paris Oecd, (2004), p. 6; Lesinska et al., 'Migration Policy in Poland and its impact on the inflows and settlement of immigrants', p. 67.
66 Lesinska et al., 'Migration Policy in Poland and its impact on the inflows and settlement of immigrants', p. 67.
67 Dziennik Ustaw (Journal of Law), No. 125, Item 128 (1997). The act came into force on 27 December 1997. In Kepinska and Stola, 'Migration Policy and Politics in Poland', p. 164.
68 Kicinger, Weinar, and Gorny, 'Advanced yet Uneven: the Europeanization of Polish Immigration Policy', p. 185.
69 Ibid.
70 Ibid.
71 Kepinska and Stola, 'Migration Policy and Politics in Poland', p. 164.
72 Iglicka, 'Poland', p. 264.
73 Dziennik Ustaw, No. 78, Item 483 (1997).
74 Kicinger, Weinar, and Gorny, 'Advanced yet Uneven: the Europeanization of Polish Immigration Policy', p. 186. For more details, see Lesinska et al., 'Migration Policy in Poland and its impact on the inflows and settlement of immigrants', pp. 84-88.

any restrictions to this rule must be justifiable, as well as specified by law.[75] The Constitution and the new Foreigners Act laid the foundation and provided the standards for the further development of Poland's national migration policy, which combined elements influenced by the Western countries and the EU, as well as strictly Polish interests such as the repatriation of foreigners of Polish origin.[76]

As a result of the EU negotiation process that was underway,[77] as soon as the Act was adopted, it already became outdated.[78] This led to comprehensive amendments of the Foreigners Act in 2001, aiming to pave the way for Poland to accede to the EU.[79] Poland was focused on enhancing the protection of its eastern border and imposing more rigid entry and labour market access rules.[80] The conditions for obtaining a permanent residence permit in Poland subsequently became more demanding, and a new obligation to leave the territory was created to supplement expulsion orders.[81] Another important amendment introduced provisions on family reunification that were consistent with Western standards as well as the initiation of a discussion on the future Family Reunification Directive.[82] In addition, 2000 saw the introduction of the Repatriation Act, which targeted the resettlement of co-ethnics exclusively from the Asiatic republics of the former Soviet Union and who lacked sufficient financial resources.[83]

Before Poland's accession to the EU, in 2003 another legislative change was introduced: general migration provisions were separated from asylum and humanitarian migration provisions by the adoption of the Act on Granting Protection to Foreigners on the Territory of Poland, an event that was commensurate with the practices of many European countries at the time.[84] In addition, a new Foreigners

75 Kepinska and Stola, 'Migration Policy and Politics in Poland', p. 163.
76 Kicinger, Weinar, and Gorny, 'Advanced yet Uneven: the Europeanization of Polish Immigration Policy', p. 186.
77 The negotiations on the chapter in the field of Justice and Home Affairs started in 2000.
78 Iglicka, 'Poland', p. 264.
79 Dziennik Ustaw, No. 42, Item 475 (2001). The act came into force on 1 July 2001. Kepinska and Stola, 'Migration Policy and Politics in Poland', pp. 164-165. Iglicka, 'Poland', p. 264.
80 Kepinska and Stola, 'Migration Policy and Politics in Poland', p. 166.
81 Kicinger, Weinar, and Gorny, 'Advanced yet Uneven: the Europeanization of Polish Immigration Policy', p. 187. Kepinska and Stola, 'Migration Policy and Politics in Poland', p. 166-167.
82 E. Kepinska and M. Okolski, 'Recent trends in international migration: Poland 2002', Prace Migracyjne, 48, Warsaw W. U. Institute for Social Studies, (2002), p. 3. Kicinger, Weinar, and Gorny, 'Advanced yet Uneven: the Europeanization of Polish Immigration Policy', p. 187.
83 Iglicka, 'Poland', p. 264. A. Weinar, *Europeizacja polskiej polityki wobec cudzoziemców 1990–2003* (Warszawa: Scholar, 2006). Quoted in Pawlak, 'Research-Policy Dialogues in Poland', p. 258. For more details, see Lesinska et al., 'Migration Policy in Poland and its impact on the inflows and settlement of immigrants', p. 86
84 Iglicka, 'Poland', p. 264. Kicinger, Weinar, and Gorny, 'Advanced yet Uneven: the Europeanization of Polish Immigration Policy', p. 188.

Act was adopted in 2003. It "polished and refined the already established institutions and procedures and further adjusted them to the EU *acquis* for the forthcoming EU accession".[85] It also set out the first regularisation programme for irregular migrants.

In October 2003, Poland also introduced visas for its CIS neighbours, which constituted a major source of disagreement in the negotiation process that preceded Poland's accession to the EU.[86] As was demonstrated in the previous section, cross-border trade was a main economic activity for many Polish citizens living at the country's eastern borders. Furthermore, the visa-free regime with these countries, which was preserved after 1989, was based on the former "socialist brotherhood" ties and reflected Poland's foreign policy interest to maintain "close contacts" in the Eastern neighbourhood in order to achieve stable and predictable geopolitical order in the region.[87] Therefore, Poland postponed the introduction of these visa requirements for as long as it could and introduced them only at the last possible moment.[88] Even after the visa regime was amended, Poland managed to secure its interests by liberalising the issuing of regular visas and the provision of no-fee visas for Ukrainian nationals and Russians residing in Kaliningrad until 2007, the year when the whole Schengen *acquis* was implemented.[89] Applicants from the rest of Russia and Belarus had to pay for the issuance of a visa. In addition, with a view to Poland's accession to the Schengen area, the country supported the introduction of a separate local border traffic regime at the external borders of the EU.[90]

6.3.2. Post-accession developments

As was demonstrated in the previous section, the EU accession was a pivotal milestone in the development of the Polish migration policy.[91] Many institutions

85 Kicinger, Weinar, and Gorny, 'Advanced yet Uneven: the Europeanization of Polish Immigration Policy', p. 188.
86 Iglicka, 'Poland', p. 265.
87 Kicinger, Weinar, and Gorny, 'Advanced yet Uneven: the Europeanization of Polish Immigration Policy', pp. 188-189.
88 Iglicka, 'Poland', p. 265.
89 Kicinger, Weinar, and Gorny, 'Advanced yet Uneven: the Europeanization of Polish Immigration Policy', p. 189; Lesinska et al., 'Migration Policy in Poland and its impact on the inflows and settlement of immigrants', p. 64. Kepinska, 'SOPEMI Report for Poland', p. 9.
90 Kicinger, Weinar, and Gorny, 'Advanced yet Uneven: the Europeanization of Polish Immigration Policy', p. 189.
91 Lesinska et al., 'Migration Policy in Poland and its impact on the inflows and settlement of immigrants', p. 58.

as well as legal and policy measures that were designed in Western Europe were transferred to Poland as part of the Europeanisation process. This led to a very paradoxical situation whereby the foundations of a migration policy started to be laid down in a top-down manner as a result of the Europeanisation pressure, rather than enacting a policy based on the real needs created by immigration processes.[92] After 2004, the position of the Polish government as a participant in the EU policy-making, as well as public statements made in the media, showed that the policy-makers were preparing for an inevitable transformation that would turn Poland form a country of emigration into one of immigration.[93] Based on the experiences of the Western European countries, this was perceived as a threat to social cohesion due to irregular migration and problems surrounding the integration of immigrants.[94] This notion became a central pillar of the evolving Polish migration policy doctrine.[95]

Poland's accession to the EU led to changes in the labour market regulations through the adoption of the Act on the Promotion of Employment and Institutions of the Labour market, which entered into force on 1 June 2004[96] and which replaced the Act on Employment and Countering Unemployment that was enacted in 1994.[97] It was centred, once again, on the protection of the Polish market due to high levels of unemployment, even though the economy was showing some signs of recovery.[98] It provided, amongst other things, for the access of EU citizens to the Polish labour market and extended the categories of workers who were not required to apply for a work permit to work in Poland.[99] The 1994 Act only exempted recognised refugees and settlement permit holders.[100]

The increased economic growth in Poland, combined with a decreased labour supply due to the massive exodus of Polish workers after Poland's accession to the EU, created gaps in some of the country's labour market sectors, such as

92 Ibid. A. Kicinger and I. Koryś, 'The case of Poland', in M. Borkert, R. Penninx, and G. Zincone (eds.), *Migration Policymaking in Europe: The Dynamics of Actors and Contexts in Past and Present* (IMISCOE Research Series: Amsterdam University Press, 2011), p. 371.

93 Lesinska et al., 'Migration Policy in Poland and its impact on the inflows and settlement of immigrants', p. 60.

94 Ibid., p. 61.

95 Ibid.

96 Dziennik Ustaw, No 99, item 1001 (2004). See Iglicka, 'Poland', p. 265.

97 Kepinska, 'SOPEMI Report for Poland', p. 6.

98 Ibid., pp. 5-6. Lesinska et al., 'Migration Policy in Poland and its impact on the inflows and settlement of immigrants', p. 69.

99 Iglicka, 'Poland', p. 265.

100 For the different categories, see Kepinska, 'SOPEMI Report for Poland', pp. 6-7.

construction, agriculture and horticulture.[101] This provided employers' organisations with a stronger mandate to lobby for the opening of the labour market to foreign workers, which was echoed by politicians and quickly entered the public discourse.[102] All these factors, combined with the pressure exerted by farmers and fruit growers who were in need of foreign workers for the forthcoming harvest and the participation of the farmer's party (*Samoobrona*) in the government coalition, led to the introduction of a simplified procedure for the short-term employment of foreigners on the basis of a declaration submitted by the employer in 2006 (the *Oświadczenie* procedure).[103]

The procedure was regulated in an order issued by the Minister of Labour and Social Affairs, who was also a member of the *Samoobrona* party. The adoption of an order was the preferred approach by the Ministry because it was fast enough to respond to the pressing needs of farmers, it provided a flexible option which allowed for amendments in case the procedure needed to be changed[104] and because it was an exemption from the general rule requiring work permits. As was stressed by one of the interviewees, it did not require the approval of the whole cabinet or parliamentary scrutiny.[105] Furthermore, it reflected the idea that Poland did not need an official labour migration policy and that the introduced *Oświadczenie* procedure was merely a temporary solution.[106]

The procedure allowed low-skilled workers from the neighbouring third countries to work in the Polish agricultural and horticulture sectors without a work permit for a period of three months in every six months on the basis of "an employer's pledge to employ the foreigner".[107] This programme expanded to all economic sectors in 2007 and the permissible work duration period was changed from three to six months in 12 month periods in 2008.[108] Furthermore, 2009 saw Moldova and Georgia being added to the list of countries that could benefit from this scheme

101 Lesinska et al., 'Migration Policy in Poland and its impact on the inflows and settlement of immigrants', p. 69.
102 Ibid.
103 Ibid., pp. 69-70. OECD, 'International Migration Outlook: SOPEMI 2011', (2011), p. 310. Interview # 2 with academic, Poland, November 2016, Annex II. Interview # 15 with academic, Poland, November 2016, Annex II.
104 Interview # 1 with officials, Poland, November 2016, Annex II.
105 Interview # 15 with academic, Poland, November 2016, Annex II.
106 Interview # 15 with academic, Poland, November 2016, Annex II.
107 Kepinska and Kindler, 'Poland', p. 274. Interview # 1 with officials, Poland, November 2016, Annex II.
108 ibid.

within the framework of the Mobility Partnerships that was signed with them.[109] In 2010, the Ministry of Labour and Social Policy took a decision to indefinitely extend the *Oświadczenie* procedure, which was only introduced initially as a pilot programme.[110] In 2014 Armenia joined the group of countries covered by this procedure.

As of 2006, the Polish labour market started to gradually open up to foreign workers.[111] The labour market provisions were liberalised by an amendment of the Act on Promotions of Employment, which entered into force in February 2009 and which simplified, shortened and made the work permit application and renewal procedure more accessible.[112] The list of categories of workers who were allowed to work in Poland without a permit was further expanded, as well as the categories of workers who were exempted from the labour market test. [113]

In 2005, the Foreigners Act and 18 other related acts were amended to transpose the Family Reunification Directive and the Long-term Residence Directive, as well as other directives that were pending implementation into Polish law.[114] In 2012, the Act on Employment Promotion and Labour Market Institutions and the Foreigners Act were amended once again to transpose the Blue Card Directive into Polish law. In addition, the Polish and Ukrainian governments signed a social security coordination agreement in May 2012.[115] 2014 saw the entry into force of a new Foreigners Act, which introduced more favourable conditions for certain categories of migrants.[116] Amongst other things, it transposed the Single Permit Directive. It also introduced the term "temporary residence permit", which replaced the "the permit to live for a limited period" and extended its validity by

109 Interview # 1 with officials, Poland, November 2016. See also "Migration Policy of Poland: state of play and further actions", 2012, p. 9 and 122.

110 OECD, 'International Migration Outlook: SOPEMI 2011', p. 310.

111 Kepinska and Kindler, 'Poland', p. 274

112 Ibid., p. 274. For more details see also Lesinska et al., 'Migration Policy in Poland and its impact on the inflows and settlement of immigrants', p. 70

113 Kepinska and Kindler, 'Poland', p. 275.

114 Act Amending the Foreigners Act of 13 June 2003 and Act on Granting Protection to Foreigners on Polish Territory of 13 June 2003 as well as other Acts, Dziennik Ustaw No. 94, item 788 (2003). See also K. Iglicka, P. Kazmierkiewicz, and A. Weiner, 'Current Immigration Debates in Europe: A Publication of the European Migration Dialogue. Poland', Brussels/Warsaw: Migration Policy Group, (2005), p. 17.

115 OECD, 'International Migration Outlook', (2013), p. 284.

116 Foreigners Act of 12 December 2013, Dziennik Ustaw, item 1650 (2013). OECD, 'International Migration Outlook', (2016), p. 290. On the visa procedure, see J. Unterschütz, 'National Report on Implementation of EU Migration Directives in Poland', in R. Blanpain, F. Hendrickx, and P. H. Olsson (eds.), *National Effects of the Implementation of EU Directives on Labour Migration from Third Countries* (Bulletin of Comparative Labour Relations The Netherlands: Kluwer Law International, 2016), p. 165.

up to three years, as well as introduced the "permanent residence permit", which replaced the "permit to settle".[117]

In February 2007, the Interdepartmental Working Group for Migration was established by the Prime Minister.[118] The advisory body, which was comprised of representatives of all the central institutions, started working on a new approach to labour migration, which deviated from the restrictive policy introduced as a result of the high unemployment rates that were present at the beginning of the 90s. It formulated the guiding principles for a comprehensive migration policy, which was approved by the government in 2012.[119] The Polish migration policy document "Migration Policy of Poland: state of play and further actions" called for a proactive response to the changed labour market with an emphasis on attracting foreign entrepreneurs, skilled workers and seasonal workers from the eastern neighbouring countries.[120]

In December 2007, Poland became part of the Schengen area, which required further amendments concerning visas to its Foreigners Act.[121] After the Local Border Traffic Regulation was adopted at the EU level, Poland signed an agreement with Ukraine, which entered into force in July 2009, and concluded another agreement with Belarus in February 2010, which has still not been ratified by the Belarusian government. During the Polish presidency of the Council, a local border traffic agreement for the Kaliningrad region was signed after two years of negotiations.[122] Such an agreement required an exception to Article 3 paragraph 2 of Regulation (EC) No. 1931/2006, which would allow the entire Kaliningrad oblast to be considered as a border area. Council Regulation No. 1342/2011/EU of 13 December 2011, amending Regulation No. 1931/2006/EC, entered into force in January 2012.[123] The bilateral agreement between Poland and the Russian Federation entered into force on 27 July 2012 allowing for reciprocal visa-free

117 Unterschütz, 'National Report on Implementation of EU Migration Directives in Poland', p. 165.
118 Lesinska et al., 'Migration Policy in Poland and its impact on the inflows and settlement of immigrants', p. 70
119 Kepinska and Kindler, 'Poland', p. 274.
120 Ibid.; OECD, 'International Migration Outlook', (2014), p. 286. It was revoked in late 2016 by the new Polish government.
121 Lesinska et al., 'Migration Policy in Poland and its impact on the inflows and settlement of immigrants', p. 64.
122 For more details, see J. Fomina, 'Local border traffic agreement for the Kaliningrad region: a success story of the Polish presidency and a trust-building exercise for Poland and Russia', Policy Brief Warsaw (2011).
123 OJ L 347, 30 December 2011.

entry for up to 30 days.[124] However, due to the tense relations between the two couries, it was suspended in 2016.[125]

After Poland's accession to the EU, it continued with its policy to strengthen its ties with foreigners of Polish decent that were living abroad.[126] In September 2007, the Act on the Pole's Card was adopted. Along with the repatriation provisions regulated in the Act on Repatriation from 2000, Article 52 (5) of the Polish Constitution legislates for the permanent settlement of foreigners who can prove that they are of Polish origin, as well as the scholarship opportunities for Polish foreign students; this became another "gate" that migrants of Polish origin could use to gain access to their "fatherland".[127] The scope of the Act on the Pole's Card was broader than the Act on Repatriation because it could be used by all foreigners of Polish origin from the former USSR, and not only those from the Asian parts of the country.[128] The Pole's Card (known in Polish as the *Karta Polaka*) confirmed belonging to the Polish nation and applied to those who could not be granted the Polish nationality because their countries of residence did not tolerate dual citizenship.[129]

As was mentioned above, the developing Polish policies became increasingly focused on preventing irregular flows. Given that unregistered employment stood out as one of the main problems of irregularity, several measures were introduced to combat and prevent irregular presence in the shadow economy. After the adoption of the regularisation program in 2003, two additional programmes were implemented in 2007 and 2012 respectively.[130] Furthermore, since 2013, employers using the simplified procedure for the employment of migrants were obliged to collect and submit detailed information about the hired workers to the Local Labour offices.[131]

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124 OECD, 'International Migration Outlook', p. 284.

125 Radio Poland, 'Local border traffic between Poland and Russia to remain suspended', 15 September 2016, retrieved at http://www.thenews.pl/1/10/Artykul/271016,Local-border-traffic-between-Poland-and-Russia-to-remain-suspended (accessed 15 May 2017).

126 Ibid.

127 Lesinska et al., 'Migration Policy in Poland and its impact on the inflows and settlement of immigrants', pp. 85- 86

128 Ibid., p. 87.

129 Kepinska and Kindler, 'Poland', p. 276.

130 For more details see ibid., p. 275. Lesinska et al., 'Migration Policy in Poland and its impact on the inflows and settlement of immigrants', p. 74.

131 Kepinska and Kindler, 'Poland', p. 275.

6.3.3. Institutional framework

After the fall of the communist rule in Poland, the Polish government had to respond to the new political reality and the changing international mobility context, which brought migration to Poland.[132] A Commissioner for Migration and Refugee Affairs was initially appointed temporarily, but it gradually became a permanent department of the Ministry of Interior and Administration.[133] In 2001, as a result of amendments to the Foreigners Act, a separate Office for Repatriation and Foreigners was established, which took over the competences of the Department of Migration and Refugees. It was empowered with granting refugee and asylum status, as well as serving as appeal body in the field of visas, residence permits, repatriation and conferring Polish citizenship on foreigners.[134] It was shaped in line with the European national administration models.[135] Its name was changed to the Office for Foreigners in 2007.

Currently, different administrative bodies have responsibility for Poland's migration policy.[136] The Ministry of Interior and Administration (MoI) and its Analyses Migration Policy Department are responsible for coordinating the migration policy and the Citizenship and Repatriation Department is especially tasked with issues relating to citizenship and repatriation. The Ministry of Foreign affairs is responsible for issuing visas to foreigners through the network of consulates abroad. The decisions on issuing of residence and work permits are the responsibility of the regional administration bodies, which are known as "voivodships" (*voivode*). They represent the central government at the regional level and are subordinated and act on behalf of the MoI. The Ministry of Family, Labour and Social Policy is responsible for sustaining the labour migration regulations. The Local Labour Offices are the authorities responsible for participating in the process of issuing work permits, as they are responsible for the performance of the labour market tests. They are given discretionary powers to apply the respective regulations, which in practice results in different migration policies existing from one regional office to another.[137]

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132 Kepinska and Stola, 'Migration Policy and Politics in Poland', p. 160.
133 Ibid., p. 161.
134 Kepinska and Okolski, 'Recent trends in international migration: Poland 2002', p. 2.
135 Weinar, *Europeizacja polskiej polityki wobec cudzoziemców 1990–2003*. Quoted in Pawlak, 'Research-Policy Dialogues in Poland', p. 258.
136 Pawlak, 'Research-Policy Dialogues in Poland', p. 259.
137 Kepinska and Stola, 'Migration Policy and Politics in Poland', p. 162.

6.4. Policy and legal instruments fostering circularity and incorporating circular migration elements

6.4.1. Developed national instruments[138]

The policy measures and regulations that foster circular migration which Poland developed after its accession to the EU were, to a large extent, a response to the barriers erected by the Schengen *acquis*.[139] The report on circular migration that was prepared by the Polish National Contact Point upon the request of the European Migration Network in 2011 highlighted the *Oświadczenie* procedure, also referred to as the simplified system, as one of the national instruments that was conducive to circular migration.[140] It emphasised that the *Oświadczenie* procedure was not a "circular migration instrument *per se*" or one of the typical circular migration programmes based on international bilateral agreements aiming to attract "guest workers".[141] Nonetheless, it possessed features, which promoted this form of migration on the basis of national law, which amongst other things facilitated access to the Polish labour market for foreigners.[142]

It was not until the adoption of the Polish migration policy document "Migration Policy of Poland: state of play and further actions" in 2012, that the concept of circular migration officially became a national policy term.[143] The document stated:

> "Conditions for a legal circular migration should be created (for instance on the basis of visa facilitations), while at the same time ensuring the possibility of transposition, into Polish law, certain solutions that are contained in the forthcoming Directive concerning admission of foreigners for seasonal work. It is worth emphasizing that circular migration, on the one hand, contributes to a decrease in the amount of hired foreigners who do

138 The interviewed experts with legal background were asked to also identify judgments of Polish national courts of importance to this topic. However, according to them there were no national cases that had bearing to circular migration. Further review could not be done due to language constrains.

139 K. Iglicka and K. Gmaj, 'Circular Migration Patterns between Ukarine and Poland', in A. Triandafyllidou (ed.), *Circular migration between Europe and its neighbourhood : choice or necessity?* (Oxford: Oxford University Press, 2013), p. 170.

140 European Migration Network, 'Temporary and Circular Migration in Poland: empirical evidence, current policy practice and future options in EU Member States', (2011), p. 15, p. 19.

141 Ibid., p. 5, p. 20. Also in Interview # 1 with officials, Poland, November 2016, Annex II.

142 Ibid., p. 18. Interview # 15 with academic, Poland, November 2016, Annex II.

143 "Migration Policy of Poland: state of play and further actions", (2012) p. 9, p. 113, p. 122. This policy document was repealed in October 2016 and at the time of writing the Polish government has not proposed a new policy yet.

> not possess work permit and reducing the phenomenon of illegal immigration. On the other hand, however, depending on the particular needs and through the use of appropriate actions and instruments, circular migration is a potential source of a verifiable permanent migration. It is also worth noting that circular migration does not undermine the human potential of sending countries, and creates a favorable system of mutual economic and interpersonal relations".[144]

The strategic document demonstrated the broad understanding of this concept by the Polish government as encompassing different instruments and not excluding permanent migration. The strategy recommended the creation of proper conditions for circular migration, for instance through the further development of the *Oświadczenie* procedure[145] and thus linked the established simplified procedure to circular migration. When asked how they understood the term circular migration, several respondents representing different stakeholders directly referred to the *Oświadczenie* procedure - that is operational between Poland and Ukraine - as an example of such migration.[146] Even though it is still "not present *expresis verbis* in existing national legal acts"[147] or developed as part of an official policy on circular migration,[148] this is the main national instrument that is considered to both "represent" and promote circular migration, and thus it is one of the national instruments that is assessed throughout this chapter.

According to the academic literature and the Polish focus groups respondents, another instrument that allows for the circulation of a special category of migrants is the *Karta Polaka* (Pole's Card).[149] Beyond the impact on the border regions, the new visa regime as result of the implementation of the Schengen *acquis*, was also

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144 See Chapter I: Legal migrations, Section 3- Labour migrations, 34 Subsection b: Recommendations.

145 A. Zogata-Kusz, *Labour immigration policy in a country known for emigration: Poland's policy towards economic immigration after EU accession* (Olomouc: Univerzita Palackého v Olomouci, 2013), p. 216. European Migration Network, 'Temporary and Circular Migration in Poland: empirical evidence, current policy practice and future options in EU Member States', p. 13. Unterschütz, 'National Report on Implementation of EU Migration Directives in Poland', p. 162.

146 Interview # 1 with officials, Poland, November 2016, Annex II; Interview # 2 with academic, Poland, November 2016, Annex II; Interview # 2 with official, Poland, November 2016, Annex II; Interview # 5 with civil society representative, Poland, November 2016, Annex II.

147 European Migration Network, 'Temporary and Circular Migration in Poland: empirical evidence, current policy practice and future options in EU Member States', p. 8.

148 Iglicka and Gmaj, 'Circular Migration Patterns between Ukarine and Poland', p. 170.

149 M. Kindler, A. Kordasiewicz, and M. Szulecka, 'Care needs and migration for domestic work: Ukraine-Poland', Global Action Programme on Migrant Domestic Workers and their Families An ILO/UE project, Geneva: International Labour Office, (2016), p. 10. Focus groups with Russian and Ukrainian migrants, Warsaw, November 2016. Interview # 10 with staff member in private recruitment agency, Poland, October 2016.

perceived in the public debate as endangering the relations with the Polish diaspora in the East.[150] Therefore, it was no coincidence that the Pole's Card Act,[151] which was in the process of preparation since the end of the 1990s,[152] came into force on 29 March 2008, one day before the final step for full Schengen integration.[153] It simplified the procedure for obtaining a multiple-entry national visa and exempted the holders thereof from paying Schengen visa fees.[154]

The applicants have to demonstrate their links with the Polish provenance by, at the very least, possessing a basic knowledge of the Polish language and a knowledge and cultivation of Polish traditions and customs.[155] They need to submit a written declaration of belonging to the Polish nation before a Polish consul. In addition, the applicants need to prove either that they possess the Polish nationality, they previously held the Polish nationality or at least one parent or grandparent or their two great grandparents held the Polish nationality or previously held the Polish nationality. The requirement for proving Polish nationality can be replaced by an attestation from a Polish organisation or Polish diaspora organisation that is active in one of the countries whose nationals are eligible to apply for the *Karta Polaka*, stating that the applicant has been actively involved in the Polish cultural and linguistic activities within the Polish community in their region for a period of at least three years hitherto.[156]

The countries whose citizens or non-citizen residents are eligible to apply for the *Karta Polaka* are Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Lithuania, Latvia, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.[157] Also eligible for the *Karta Polaka* are foreigners from

150 A. Müller, *Governing mobility beyond the state: centre, periphery and the EU's external borders* (Palgrave studies in European political sociology: Palgrave Macmillan, 2014), p. 148.

151 Article 2, Pole's Card Act. See I. Kozak, M. Tota, and B. Wojcik, *Long-term Residence of Foreigners in Poland in the Light of Act on Foreigners of 12 December 2013* (Prawo I Polityka Migracyjna II; Lublin: Rule of Law Institute Foundation, 2014) p. 188. This is a different procedure from the one determining Polish origin. For the differences, see ibid., pp. 185-189.

152 Zogata-Kusz, *Labour immigration policy in a country known for emigration: Poland's policy towards economic immigration after EU accession*, p. 160.

153 The final integration step of Poland into the Schengen area occurred on 30 March 2008, when the border controls on internal EU flights were lifted. In A. Gros-Tchorbadjiyska, 'The Europeanization of Visa Policy: A Transfer of Sovereignty Shaped by enlargement', (Katholieke Universiteit Leuven 2010), p. 265.

154 Ibid.

155 I. Kozak, M. Tota, and B. Wojcik, *Long-term Residence of Foreigners in Poland in the Light of Act on Foreigners of 12 December 2013* (Prawo I Polityka Migracyjna II; Lublin: Rule of Law Institute Foundation, 2014), p. 188.

156 Ibid.

157 Article 2, second paragraph, Pole's Card Act.

one of the above-mentioned countries whose Polish origin has been established according to the procedure stipulated in the Act on Repatriation. Foreigners who are granted a *Karta Polaka* also entitled to apply for permit to settle in Poland.[158]

Another important policy area that is pertinent to circular migration is that of visa policy. One of the objectives of the Polish visa policy is to support the implementation of the Eastern Partnership initiative, which aims to foster the on-going transformation in this region, by *inter alia* liberalising and eventually lifting the visa regimes on the Eastern Partnership countries.[159] On the basis of the close links between Poland and the countries in this region, promoting the possibility of movement of persons and economic migration with regard to Poland's Eastern partners constitutes an important element of these activities.[160] Therefore, the national visa policy and especially Poland's bilateral visa policy agreements with the Eastern Partnership countries must also be considered as instruments that incorporate elements of circular migration, as is also underlined by the strategic document "Migration Policy of Poland: state of play and further actions".

As was already demonstrated in Chapter 5 of this study, the social security coordination between the Member States and third countries remains a subject of the conclusion of bilateral agreements between the individual states. Therefore, this chapter also looks into these bilateral instruments in the context of the Eastern Partnership neighbourhood which can support rights-based circular migration.

The equal treatment provisions concerning the recognition of qualifications in the legal migration directives discussed in Chapter 5 showed that the different categories of migrants can benefit from the existing procedures at the national level in the Member States. Therefore, in order to assess what these equal treatment clauses mean in practice and what the measures available to circular migrants are, one should closely analyse the provisions of national law to ascertain this information. Therefore, this chapter considers the national regulations concerning the recognition of academic qualifications. Furthermore, in order to be able to properly assess the intersection between the policies on circular migration and the recognition of professional qualifications, this chapter also focuses on two regulated professions, physicians and nurses, and presents the respective procedures relating thereto.

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158 Article 195, par 1., it. 3 and it.9, AF.
159 European Migration Network, 'Visa policy as migration channel in Poland. National report', (2012), p. 5.
160 Ibid.

6.4.2. EU instruments

Poland continued its pre-accession strategy as a participant in the EU decision-making process. It transferred its national foreign policy to the EU agenda and started advocating in favour of visa-free regimes between the EU and the neighbouring CIS countries, incorporating them in the prevention of undesired migration to the EU and establishing exterritorial means of migration control.[161] Together with Sweden, it initiated the European Union's Eastern Partnership, which amongst other things focuses on the facilitation of arrivals from CIS countries under the Schengen *acquis* at the EU level.[162]

Therefore, along with the national visa policy this section also considers the implementation of the EU visa instruments, as were presented in Chapter 5. Moreover, the Local Border Traffic Regulation which permits the conclusion of local border traffic agreements is highlighted as one of the instruments that facilitates circular migration in Poland's Eastern border region.[163] In addition, the visa facilitation agreements concluded between the EU and the Eastern Partnership countries under the auspices of the GAMM will also be considered in this chapter.

Another important element of the GAMM when it comes to circular migration, is the different initiatives carried out in the context of Mobility Partnerships. In response to the Communication of the Commission on Mobility Partnerships and Circular Migration, the Polish government decided to expand the *Oświadczenie* procedure as part of the GAMM.[164] One of the interviewees actually claimed that the Polish representatives involved in the management of the Mobility Partnerships were asked by the European Commission to promote the *Oświadczenie* procedure as a circular migration scheme: "they take anything that looks like it and put the label".[165] Initially only open to Ukraine, Belarus and Russia, it was gradually included in the Mobility Partnerships that were concluded with the Eastern Partnership countries and currently covers five of them. Therefore, the *Oświadczenie* procedure is considered to have a dual role, as both a national and as an instrument of the GAMM, and will be analysed under both the national and EU sections of this chapter.

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161 Müller, *Governing mobility beyond the state: centre, periphery and the EU's external borders,* p. 135.
162 European Migration Network, 'Visa policy as migration channel in Poland. National report', p. 32.
163 European Migration Network, 'Temporary and Circular Migration in Poland: empirical evidence, current policy practice and future options in EU Member States', p. 18.
164 Interview # 18 with official, Poland, November 2016, Annex II.
165 Interview # 12 with academic, Italy, May 2013, Annex II.

The following sections also focus on the outcomes and outputs from the transposition of the EU legal migration directives, as were presented in Chapter 5. The Foreigners Act of 2013, which came into force on 1 May 2014, brought about the full implementation of a number of EU directives.[166] It transposed the Single Permit Directive, it fully implemented the Blue Card Directive,[167] the Researchers' Directive[168] and the Family Reunification Directive. The Long-term Residence Directive was transposed in 2003 following the entry into force of the Foreigners Act and then incorporated in the new Act of 2013.[169] The Seasonal Workers' and the ICT Directive are currently past their due date for transposition[170] and their implementation is therefore, at the time of writing, pending. Therefore, they do not form part of this chapter's analysis.

6.5. Entry and re-entry conditions – instruments at the EU and national level

6.5.1. National instruments

The Foreigners Act of 2013 regulates the granting, extension and revocation or cancellation of national visas.[171] A national visa authorises foreigners[172] to enter Poland and stay on its territory uninterruptedly or within several consecutive stays lasting, in total, no longer than 90 days within the period of the visa's validity.[173] The validity of the visa is not longer than one year.[174] The periods of stay are determined in line with Article 50, paragraph 1 thereof and take into account the purpose of the stay that is specified by the applicant.[175] The Polish Foreigners Act lists 22 purposes, for which a national visa may be issued among which, for example, are "performing work for a period no longer than 6 months within 12 consecutive months, based on declaration of intent to entrust the performance of

166 Foreigners Act of 12 December 2013, Dziennik Ustaw, item 1650 (2013).
167 Transposed initially in the Act on amendment of the Foreigners Act and the Act on Employment Promotion and Labour Market Institutions of 27 April 2012, Dziennik Ustaw, No 0, item 589 (2012).
168 Directive 2005/71/EC, Transposed initially in the Act on Amendment to the Foreigners Act and some other acts of 24 May 2007.
169 Ustawa z dnia 13 czerwca 2003 r. o cudzoziemcach, Dziennik Ustaw, No 128, item1175 (2003).
170 The dead line for transposition for the Seasonal Workers' Directive was 30 September 2016 and for the ICT Directive, 29 November 2016.
171 Kozak, Tota, and Wojcik, *Long-term Residence of Foreigners in Poland in the Light of Act on Foreigners of 12 December 2013,* p. 132.
172 In Poland's national legislation "foreigner" refers to "third-country national".
173 Article 59, Para 1, AF.
174 Article 59, Para 3, AF.
175 Article 59, Para 2, AF.

work, registered in the poviat labour office", [176] "carrying out research or development"[177] or "enjoying the rights of a holder of Pole's Card".[178] Furthermore, in a flexible manner, the Act allows a foreigner to provide reason for arriving in Poland, which is not covered by the law.[179]

In line with Poland's policy towards its Eastern neighbours, citizens of three countries are exempt from paying the consular fees for the processing of visa applications when applying for a Polish long-stay visa (known as a visa type D). Following the adoption of a bilateral intergovernmental agreement, citizens of Ukraine have been exempted since August 2012 on the basis of the principle of reciprocity.[180] The citizens of Belarus have also been exempted from visa application fees since January 2011 on the basis of a unilateral decision taken by the Polish Minister of Foreign Affairs.[181] Before that, the citizens of Belarus had to pay fee of 20 EUR. A similar decision was also taken regarding the citizens of Moldova, which as of 1 May 2013 are also exempted from paying the visa processing fees. In addition, foreigners who have obtained the Pole's Card are entitled to receive, free of charge, a special long-stay visa for multiple crossings of the Polish border, issued on the basis of Article 60, Para 1 (20) of the Foreigners Act.

Foreigners are refused a national visa if at least one of the following situations arises: their data is entered in the register of persons whose stay is undesirable in Poland or recorded in the SIS for the purposes of refusing entry,[182] where they do not have sufficient means to cover the expenses to be incurred in the intended period of stay in Poland and the costs of return to the country of origin,[183] where they do not have health or medical insurance, when a refusal is justified by national security or defence, the protection of public order and safety of the Polish interests, when they do not have a valid travel document or any other documentation

176 Article 60, Para 1 (5), AF.
177 Article 60, Para 1 (13), AF.
178 Article 60, Para 1 (20), AF.
179 Kozak, Tota, and Wojcik, *Long-term Residence of Foreigners in Poland in the Light of Act on Foreigners of 12 December 2013* p. 132. Article 60, Para 1 (25), AF.
180 Polish National Contact Point to the European Migration Network,' Poland abolished long-term visa fees for Moldovan citizens', retrieved at: https://emn.gov.pl/ese/news/10543,Poland-abolished-long-term-visa-fees-for-Moldovan-citizens.html (accessed 25 April 2017).
181 European Migration Network, 'Visa policy as migration channel in Poland. National report', p. 17.
182 For more information on when one's data can be registered in these databases, see Kozak, Tota, and Wojcik, *Long-term Residence of Foreigners in Poland in the Light of Act on Foreigners of 12 December 2013,* p. 135.
183 In line with Article 49 AF the foreigners can present an invitation by a Polish national, EU or EFTA national, a long-term or permanent resident in Poland or a legal person established in Poland certifying the possession of sufficient financial means to cover the cost associated with the stay in Poland and return to the country of origin.

entitling them to cross the external border of the Schengen area, or when the document has expired earlier than three months before the expiry data of the requested visa, when false data has been used or other documents have been falsified in the proceedings of issuing a national visa or when foreigners have not justified the purpose and conditions of their intended stay and they are justified doubts about their intention to leave the territory of Poland before the expiration of their visa.[184] A visa can be revoked *ex officio,* when the grounds for refusal of a national visa took place after it was issued, or at the request of its holder.[185]

The Polish Foreigners Act stipulates that a foreigner is obliged to either leave the territory of Poland or apply for a residence permit within the period of validity of the national visa.[186] However, it also enumerates certain conditions, in Article 82 thereof, that may lead to the extension of the visas's validity. The condition that is most relevant for circular migration purposes is that the extension is justified by "vital personal or professional interests of the foreigner" or when "the foreigner is unable to leave the territory before the expiry of the national visa or before the end of the authorised period of stay".[187] The other conditions are related to the unforeseeable events that occurred independently of the will of the foreigner at the time of the visa application, when there are circumstances that do not indicate that the purpose of the foreigner's stay will be different than the one declared and finally, when there are no grounds on which the foreigner should be refused a visa.[188]

When a foreigner applies for work visa based on Article 60, Para 1 (4-6) of the Foreigners Act, he/she needs to either obtain a work permit or have a written declaration of the intention to commission work to a foreigner in line with the *Oświadczenie* procedure.[189] The application and issue of a work permit is regulated by the Act of 20 April 2004 on Employment Promotion and Labour Market

184 Article 65, Para 1, 1-9 AF. For the available re-examination and appeal procedures, see Kozak, Tota, and Wojcik, *Long-term Residence of Foreigners in Poland in the Light of Act on Foreigners of 12 December 2013,* pp. 136-137.

185 Ibid., p. 139. See for the grounds of refusal see Article 65 (1) AF. For the provision on the request of the holder see Article 90 AF.

186 Ibid., p. 138.

187 Article 82, Para 1 (1) AF.

188 Article 82, Para 1 (2-3) AF.

189 Unterschütz, 'National Report on Implementation of EU Migration Directives in Poland', p. 163.

Institutions.[190] Article 88 of that Act lists all the cases when an employer needs to apply for a work permit.[191] A work permit is issued by the *voivode*, if the remuneration offered to the migrant worker is not lower than the remuneration of employees performing work of a comparable type or comparable work, and if the results of a labour market test are negative. [192]

According to Polish law, a labour market test is performed by the local governor in the Local Labour Office (*poviat*) upon a request by the employer.[193] The competent Local Labour Office, depending on the place where the work will be performed, provides information about the lack of possibilities to meet the workforce needs of the employer on the basis of a review of the register of the unemployed and job-seekers, no later than 14 days or in 21 days if the labour market test is organised on the basis of recruitment for the employer. The labour market test also takes into account the priority of access to the labour market for Polish and EU citizens, as well as other categories of foreigners that are stipulated in Article 87, Para 1 of the Act on Employment Promotion and Labour Market Institutions. Nonetheless, there are several cases, in which specific categories of migrant workers can be exempted from the obligation to perform a labour market test.[194] In case of a successful application, a work permit is issued for a definite period of time, which cannot be longer than three years and which can be prolonged.[195]

In addition, the Act on Employment Promotion and Labour Market Institutions allows for many exemptions from this provision, which are enumerated in Article 87, Para 2 thereof. This Article is given further enumeration by an Order issued by

190 Consolidated text, Dziennik Ustaw, item 149 (2015) as amended. In addition, there are three main Regulations: Regulation of 1.04.2015 of the Minister of Labour and Social Policy on the issuance of work permits to foreigners (Dziennik Ustaw, item 543, 2015), Regulation of 21.04.2015 of the Minister of Labour and Social Policy on cases when employing a foreigner in the Republic of Poland is permitted without the need to obtain a permit to work (Dziennik Ustaw, item 588, 2015) and Regulation of 29.01.2009 of the Minister of Labour and Social Policy on determining when the work permit is issued to a foreigner regardless of the specific terms of licensing in employment of foreigners (consolidated text, Dziennik Ustaw, item 97, (2015) as amended).

191 For a detailed description of the different work permits, see Unterschütz, 'National Report on Implementation of EU Migration Directives in Poland', pp. 167-168.

192 Article 88c, Para 1 AEPMLI.

193 See Article 88c, Para 1 (2) AEPMLI.

194 For full description of these cases, see Kozak, Tota, and Wojcik, Long-term Residence of Foreigners in Poland in the Light of Act on Foreigners of 12 December 2013, pp. 151-153.

195 Article 88e AEPMLI.

the Minister of Labour and Social Policy.[196] According to Para 1 (20) thereof, the workers applying through the *Oświadczenie* procedure are among the foreigners who have the right to perform work in the territory of the Republic of Poland without the requirement to obtain a work permit. The Order states that the eligible candidates are those nationals of the Republic of Armenia, the Republic of Belarus, the Republic of Moldova, the Russian Federation, Georgia and Ukraine, performing work within a period not exceeding six months within the following 12 months, independent of the number of entities (employers) entrusting them with work. The sole prior requirement is that each employer (referred to in the Order as the entity) registers, in writing, a declaration of intention to commission work for the foreigner concerned in the Local Labour Office (*poviat*), competent mainly in the field of unemployment with respect to the place of residence or seat of the employer.

The declaration that the employer needs to register shall indicate: the type of work, the place of performing the said work, the date of commencing said work and the length of the employment contract, the type of contract forming the basis of performing the work and the gross remuneration. It must also state that the employer is acquainted with the legal regulations on the residence and employment of foreigners in the territory of the Republic of Poland and that the employer is unable to meet the staffing requirements by recourse to the local labour market. Another requirement is that the work commissioned to the foreigner is based on a written employment contract concluded on the basis that is outlined in the declaration. A signed and registered declaration can serve as the basis for the work visa application.[197] However, performing work on the basis of the declaration is only legal when, after their entry into Poland, the foreigner concludes an employment or civil contract with the employer.[198]

Foreigners who have obtained a *Karta Polaka* are also exempted from the requirement to apply for a work permit in line with Article 6 of the Pole's Card Act.[199] They are entitled to take up employment on the territory of Poland and carry

196 Order of the Minister of Labour and Social Policy of 21 April 2015, concerning cases where commission of work to foreigners in the territory of the Republic of Poland is permitted without the requirement of obtaining a work permit. Issued on the basis of Article 90, paragraph 4, of the Act of 20 April 2004 on Employment Promotion and Labour Market Institutions. Dziennik Ustaw, No 149, item 357 (2015).

197 Kozak, Tota, and Wojcik, *Long-term Residence of Foreigners in Poland in the Light of Act on Foreigners of 12 December 2013,* p. 142.

198 For more details on the possible financial penalty and Criminal Code regulation penalising untrue statements see ibid.

199 Act of 7 September 2007 on the Pole's Card. Consolidated text, Dziennik Ustaw, item 1187 (2014).

out economic activities on the same conditions as those applicable to Polish citizens.[200]

6.5.2. EU instruments

6.5.2.1. Legal instruments aimed at circular migration facilitation

Blue Card Directive

The Blue Card Directive was transposed into the Polish Foreigners Act through the introduction of a special temporary residence permit for the purposes of highly- qualified employment, referred to as the "EU Blue Card permit" (in Polish: *Niebieska Karta UE*), which is issued through a single administrative procedure.[201] Article 127 thereof lists the conditions that must be fulfilled in order for the permit to be granted. The foreigner needs to have concluded an employment, a tolling or a civil law agreement of a minimum of one year providing for an annual gross remuneration not lower than the equivalent of 150% of the average monthly salary in the national economy in the preceding calendar year (about 1200 EUR[202]).[203] The applicant must fulfil the qualification requirements and other conditions in cases where he or she is to perform work in a regulated profession in line with Article (2) 1 of the Act of 18 March 2008 on the principles of recognition of professional qualifications acquired in the EU Member States. Furthermore, the applicant must possess the authorisation of a competent authority to hold a given position, pursue a given profession or activity, where the obligation to obtain it before entering into the agreement stems from separate regulations.

Additionally, the foreigner must have a higher professional qualification, meaning that he/she has completed at least three-year course of study at a higher education institution or five years of professional experience in a field that is compatible with the profession. Finally, the foreigner must have health insurance or a confirmation of coverage by an insurer for any treatment that may be sustained on the Polish territory.

Poland decided to make use of Article 6 of the directive and as part of the Blue Card application procedure it requires the execution of a labour market test

200 European Migration Network, 'Visa policy as migration channel in Poland. National report', p. 21.
201 Unterschütz, 'National Report on Implementation of EU Migration Directives in Poland', p. 184.
202 Ibid., p. 185.
203 For more details on the calculation, see Article 139 AF.

showing that the employer cannot "satisfy its staffing needs with the local labour market".[204] The procedure for conducting a labour market test follows the one described above and is commensurate with Article 88 of the Act of 20 April 2004 on Employment Promotion and Labour Market Institutions.[205] The foreigner needs to attach the information regarding the performed labour market test as part of his/her application. The labour market test is required only during the first two years of foreigner's stay as a Blue Card holder in Poland.[206] In addition, Article 129 provides for several exemptions from the test, for instance, when the profession that the foreigner will perform in Poland is part of the list of professions and types of work in short supply in the local labour market, as indicated by the *voivode*.[207] Exemptions for foreigners and employers from the labour market test are also possible when the foreigner had a work permit or a residence and a work permit immediately before the filing of the application for the same employer, entrusting him/her to perform work in the same position or when he/she meets the conditions for exemption of a work permit regulated in the Ordinances pursuant to Article 90 (5) of Act of 20 April 2004 on Employment Promotion and Labour Market Institutions.

The Blue Card permit is granted for a period longer by three months than the period during which work is to be performed but not longer than three years in total.[208] Foreigners can be refused a Blue Card permit when the conditions of granting it are not fulfilled, *inter alia* when they are not eligible to obtain a temporary permit because the declared purpose of stay or the circumstances that are the ground for applying for this permit do not justify their stay in Poland for longer than three months and when their data is listed on the SIS for the purpose of refusing entry or whose residence is considered undesirable in Poland.[209]

According to Article 215 (1) of the Foreigners Act, a former Blue Card holder who obtains an EU long-term residence permit can have it revoked when the holder leaves the territory of Poland for a period of more than six years or when the holder leaves the territory of the EU for a period of 24 consecutive months.[210]

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204 Article 127 (2) AF.
205 Article 136 AF.
206 Article 129 (3) AF.
207 Unterschütz, 'National Report on Implementation of EU Migration Directives in Poland', p. 185.
208 Article 128 AF.
209 For more details, see Articles 132-133 AF and Unterschütz, 'National Report on Implementation of EU Migration Directives in Poland', p. 186.
210 For revocation grounds, see Article 133 in conjunction with Article 101 AF.

6.5.2.2. Instruments that contain some circular migration elements

EU Visa instruments

Local border traffic agreements

Currently the only bilateral Local border traffic agreement in force between Poland and its Eastern neighbours is the 2009 agreement with Ukraine. The Act on Foreigners stipulates the general provisions on the crossing of the border under the local border traffic regime.[211] Since the text of the agreement that Poland concluded is analagous,[212] the presented information in this section also covers the agreement with Kaliningrad and provides some insights into the pending agreement with Belarus. According to the agreements, border area residents are persons with documented permanent residence in the border area for a period of at least three years, and their spouses and children who are their dependents.[213] The Agreement with Ukraine covers the border area zone up to 30 km from the shared border. The suspended agreement with the Russian Federation provided that the local border traffic regime applies to all of the inhabitants on the Russian side of the Kaliningrad region, and on the Polish side including the residents of large parts of the Pomerania and Warmia-Mazury *voivodes* respectively.[214]

A permit can be issued to a border resident who holds a valid travel document, presents proof of permanent residence in the border area for at least three years, presents a legitimate reason for frequently crossing the respective border, which according to the legislation of the contracting parties does not constitute gainful activity or gainful employment.[215] Permit applications can be rejected depending on the applicable national legislation. For example, Polish authorities can refuse to issue local border permits if the applicant is registered in the SIS for the purposes of refusing entry or who is considered to be a threat to public policy, internal security, public health or to the international relations between Poland and a Member State of the EU.[216] The fee for submitting and processing an application permit is

211 Articles 37-48 AF.

212 O. Wasilewska, 'Analysis of the visa policies of the Visegrad countries: Relative openness. Polish visa policy towards Belarus, Moldova, Russia and Ukarine', (2008), p. 10.

213 See for example Article 2, Para 1 (e) and Para 2 of the Agreement between the Government of the Republic of Poland and the Government of the Russian federation on the Rules of Local Border Traffic.

214 Migrantinfo.pl, 'Local Border Traffic', retrieved at: http://www.migrant.info.pl/Local_border_traffic.html (accessed 27 April 2017).

215 Article 3, Para 1 of the Agreement between the Government of the Republic of Poland and the Government of the Russian federation on the Rules of Local Border Traffic.

216 See Article 3, Para 2 of the Agreement between the Government of the Republic of Poland and the Government of the Russian federation on the Rules of Local Border Traffic.

20 EUR. Persons with disabilities, pensioners and children under the age of 18 in the case of Ukrainian citizens and below the age of 16 in the case of Russian citizens are exempted from paying that fee.[217]

A local border permit holder can cross the border an unlimited number of times but can only stay in the designated border areas for a period of up to 60 days from the date of entry in the case of Ukrainian citizens, and 30 days thereof in the case of Russian citizens, but the total period of stay cannot exceed 90 days during any given six months calculated from the date of first entry.[218] The first local border traffic permit is issued for up to two years, but not for longer than the period of validity of the travel document.[219] Persons crossing the Polish-Ukrainian border under the local border traffic regime must also possess health insurance documentation which covers the full duration of their stay abroad, and in any event for no less than 14 days.[220]

GAMM instruments

Visa facilitation agreements

In line with the bilateral relations of Poland in the context of the Eastern Partnership, alongside the measures aiming to conclude and implement local border traffic agreements, Poland also supports the efforts directed at the visa facilitation at the EU level.[221] The Visa Facilitation Agreements that the EU has concluded with the Eastern Partnership countries were already discussed in Chapter 4.

Mobility Partnerships

As has already been stressed in this chapter, the *Oświadczenie* procedure possesses a dual role – a national instrument facilitating circular migration, and an initiative, which was introduced as part of the GAMM in response to the Communication of the Commission on Mobility Partnerships and Circular Migration in 2007. Initially only open to Ukraine, Belarus and Russia, it was gradually included in the scoreboards of the countries of the Eastern Partnership, which concluded Mobility Partnerships with the EU. Apart from this Mobility Partnership initia-

217 Migrantinfo.pl, 'Local Border Traffic', retrieved at: http://www.migrant.info.pl/Local_border_traffic.html (accessed 27 April 2017).
218 Migrantinfo.pl, 'Local Border Traffic', retrieved at: http://www.migrant.info.pl/Local_border_traffic.html (accessed 27 April 2017).
219 See Article 4, Para 2 of the Agreement between the Government of the Republic of Poland and the Government of the Russian federation on the Rules of Local Border Traffic.
220 Migrantinfo.pl, 'Local Border Traffic', retrieved at: http://www.migrant.info.pl/Local_border_traffic.html (accessed 27 April 2017).
221 European Migration Network, 'Visa policy as migration channel in Poland. National report', p. 32.

tive, Poland does not participate in any other initiatives piloting circular migration projects.[222] Poland instead took part in different projects covering this type of mobility that were initiated by the IOM and the ICMPD, such as those projects carried out under the auspices of the Prague Process. In addition, IOM Georgia implemented the project "Temporary Labour Migration of Georgian Workers to Poland and Estonia" which aimed to develop operational frameworks for facilitating worker mobility from Georgia to Poland and Estonia that in turn would promote effective job-matching, migrant skill development and protection of their labour and human rights.[223] According to the IOM office in Georgia, the spontaneous character of labour migration of Georgians using the *Oświadczenie* procedure does not allow the Georgian Government to adequately respond to national workforce development needs and ensure better skills matching with the Polish labour market demands in the long-term.[224]

Legal Migration Directives

EU Long-term Residence Directive

The EU Long-term Residence Directive was transposed into Polish law via Chapter VI of the Polish Foreigners Act. According to Article 215 (1) of the Foreigners Act, an EU long-term residence permit is revoked when the holder leaves the territory of Poland for a period longer than six years or where the holder has left the territory of the EU for a period of 12 consecutive months. The Act does not allow for longer periods of absence for specific or exceptional reasons in line with Article 9 (1) (c) of the directive.

Researchers' Directive

At the time of writing, Poland has still not transposed the new Students' and Researchers' Directive. Directive 2005/71/EC was transposed through the Act on Amendment to the Foreigners Act and some other acts of 24 May 2007, but its full implementation did not come about until the entry into force of the Foreigners Act of 2013 in May 2014. The Foreigners Act of 2013 introduced a separate chapter on the temporary residence permit for the purpose of conducting research in chapter

222 Interview #18 with official, Poland, November 2016, Annex II.

223 International Organization for Migration, Mission to Georgia,' Temporary Labour Migration of Georgian Workers to Poland and Estonia', retrieved at http://iom.ge/1/labour-migration (accessed 30 April 2017).

224 International Organization for Migration, Mission to Georgia,'Temporary Labour Migration of Georgian Workers to Poland and Estonia', retrieved at http://iom.ge/1/labour-migration (accessed 30 April 2017).

7 of part V. The applicant procedure requires the foreigner to apply in person[225] and to present an agreement that has been concluded with a research institution that is established in Poland, admitting him/her to conduct a research project.[226] In addition, the researcher also has to present a written declaration completed by the research organisation, in which it commits to cover the researcher's cost of staying in Poland and the cost of executing an eventual return order issued to the foreigner within six months from the expiration of the agreement, if the ground for issuing the return order is fulfilled by irregular stay in Poland.[227] The rest of the requirements are the same as for the other temporary residence permits – i.e., obligation to have health insurance and the possession of sufficient financial resources.[228] The permit is valid for a period of up to three years.

6.5.2.3. Relevant instruments without explicit reference to circular migration

Single Permit Directive

The transposition of the Single Permit Directive into the Foreigners Act of 2013 led to the establishment of a single procedure for a newly introduced temporary permit (*zezwolenie na pobyt czasowy i pracę*), which changed the existing legislation by merging both the work and residence permit. Before the changes came into force, the employers first had to obtain a work permit for the workers that they wanted to hire and only after that could the foreigners subsequently apply for a residence permit.[229] Only those foreigners who were already legally resident in Poland and intended to work for more than three months could apply for a single permit for temporary residence and work.[230] The rest of the foreigners who were located outside of Poland, entered on the basis of a visa or through a visa-free regime and followed the existing procedure for applying for a work permit under the Foreigners Act and the Act on Employment Promotion and Labour Market Institutions described above.

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225 If the application is not submitted in person, the applicant is obliged to appear at the relevant voivode within 7 days from the date of submitting application in line with Article 105, Para. 1 (2) AF.

226 Article 151, Para 1 (2) AF. Only research institutions covered by the Act on the rules of financing of science of 2010 can apply for approval to sign an agreement with a foreign researcher. For all requirements towards the research organisation, see Article 153 AF.

227 Article 151, Para 1 (2) AF.

228 Article 151, Para 1 (3) and (4) AF.

229 Unterschütz, 'National Report on Implementation of EU Migration Directives in Poland', p. 179.

230 Ibid.

In order to obtain a single permit, foreigners must fulfil several conditions: they must have the performance of work as the purpose of their stay in Poland, they must have health insurance and stable and regular sources of income enabling them to cover the costs of maintaining themselves and their families, they must have a place of residence in Poland, they must present the negative results of a labour market test conducted by the local authority on the initiative of the employer, they must have a remuneration specified in their contract as not lower than the salary of employees performing the same work at the same time, or work of a comparable nature in a comparable position.[231] In addition, if the worker applies for a regulated profession, he/she needs to meet the requirements for entry into the specific professions. Failure to meet those criteria could be a reason for refusing to issue the permit. Other grounds of refusal include presenting fraudulent documents during the application, as well as criminal offences or misdemeanours against workers' rights or for the employer, the employment of irregular migrants.[232] The procedure to grant or refuse a permit may last up to 30 days or two months in more complicated cases.

6.6. Entry and re-entry conditions – implementation dynamics

6.6.1. National instruments

The participants in the focus group shared very diverse experiences with regards to circular migration, which in most of the cases presented a picture of circularity consisting of chain of different trajectories supported by various instruments. Almost all of the Ukrainians and a few of the participants in the Russian focus group experienced, at some point in time, the *Oświadczenie* procedure, which they used both as an entry mechanism to Poland and as means of circulation.[233] Several of them had experience with obtaining a fake declaration, which enabled them to enter Poland and look for a job, and afterwards to obtain a new *Oświadczenie* (declaration) stating the real employment or used other ways to "legalise their stay", e.g., by starting a course of study. The fake declarations were usually obtained through friends, acquaintances or colleagues who registered a declaration, stating that they needed the person in question. They could also be bought online through different social media channels for 100 USD[234] or through interme-

231 Ibid., p. 180.
232 Ibid.
233 Focus groups with Russian and Ukrainian migrants, Poland, November 2016, Annex IV. Interview # 6 with lawyers, Poland, November 2016, Annex II.
234 Focus group with Russian migrants, Poland, November 2016, Annex IV.

diaries in Ukraine for 200-250 USD,[235] in cases when the migrants did not know anyone in Poland who could register a declaration on their behalf.[236]

The analysis of the data gathered through the focus groups and interviews shows that the migrants using the *Oświadczenie* procedure for the purposes of circular migration did not face any problems with regards to entry and re-entry conditions, when the registered declaration was properly filled in.[237] One of the participants in the Ukrainian focus group remarked that he was deported due to a discrepancy between the information about his working-place submitted in the declaration by the employer and the actual working place.[238] He successfully appealed this decision, stating that this was a mistake by the employer, and he was eventually allowed to return to Poland.

The participants using the *Oświadczenie* procedure as an entry mechanism shared that the majority of them had trouble finding a job in Poland, which would have allowed them to come on a work visa.[239] Using the declaration system gave them limited time to come to Poland, look for a job and convince an employer to hire them, so that they could begin the procedure for obtaining the single permit.[240] In the case of the recently arrived Ukrainians, this was the fastest possible way to leave Ukraine on account of the political situation (instead of applying for asylum) or to actually enter Poland as soon as possible before "some new regulations were introduced in January 2017" (the pending changes due to the transposition of the Seasonal Workers' Directive).[241]

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235 Interview # 1 with officials, Poland, November 2016, Annex II. Interview # 6 with lawyers, Poland, November 2016, Annex II. Interview # 5 with civil society representative, Poland, November 2016, Annex II. Interview # 10 with staff member of a private recruitment agency, Poland, October 2016, Annex II.

236 Focus group with Ukrainian migrants, Poland, November 2016, Annex IV.

237 Focus groups with Russian and Ukrainian migrants, Poland, November 2016, Annex IV. Interview # 9 with employer, Poland, December 2016, Annex II.

238 Focus group with Ukrainian migrants, Poland, November 2016, Annex IV.

239 Focus groups with Russian and Ukrainian migrants, Poland, November 2016, Annex IV.

240 Focus groups with Russian and Ukrainian migrants, Poland, November 2016, Annex IV. Interview # 6 with lawyers, Poland, November 2016, Annex II.

241 Focus group with Ukrainian migrants, Poland, November 2016, Annex IV. Interview # 7 with official, Poland, November 2016, Annex II. Interview # 6 with lawyers, Poland, November 2016, Annex II. Amendments were introduced as of January 2018.

Year	Citizenship						Total per year
	Belarus	Russia	Ukraine	Moldova	Georgia	Armenia	
First half of 2017	24216	2694	904854	12949	1980	1224	**947917**
2016	23400	3937	1262845	20650	1698	1597	**1314127**
2015	5599	1939	762700	9575	1366	1043	**782222**
2014	4017	1227	372946	6331	2103	774	**387398**
2012	5194	1260	217571	9248	2343	-	**235616**
2011	4370	963	239646	13024	1774	-	**259777**

Table 6.1. Registered declarations under the Oświadczenie procedure in the period 2011-2017. Source: Ministry of Family, Labour and Social Policy, Poland[242]

The interviews conducted with representatives of the administration brought another perspective to the use of this procedure. According to the officials that were interviewed, due to its liberal character, the procedure was very often abused by both migrant workers and employers.[243] One of the most frequent problems was caused by employers who issued much more declarations than the actual required number of seasonal workers as a way to make sure that some migrant workers would eventually come and work for them. Another issue stemmed from migrants who used the *Oświadczenie* procedure as a means to access to the Schengen zone and did not begin working with the employer who registered the declaration. The officials shared that they received information from their colleagues in other Member States that they were irregularly working migrants who entered on a visa issued on the basis of the *Oświadczenie* procedure.[244] Very often migrant workers would use this procedure when they wished their relatives to visit them because it was cheaper and faster than applying for a tourist visa.[245] These problems contributed to the overburdening of Ukrainian consulates, which had to handle the increased amount of visa applications. The large queues for submitting visa

242 Ministry of Family, Labour and Social Policy, Cudzoziemcy pracujący w Polsce – statystyki (Foreigners working in Poland – data), retrieved at http://www.mpips.gov.pl/analizy-i-raporty/cudzoziemcy-pracujacy-w-polsce-statystyki/ (accessed 17 November 2017).

243 Interview # 1 with officials, Poland, November 2016, Annex II.

244 Interview # 1 with officials, Poland, November 2016, Annex II.

245 Also in interview # 3 with civil society actor, Poland, November 2016, Annex II and Interview # 2 with academic, Poland, November 2016, Annex II.

applications caused delays and was conducive to corruption that was facilitated by intermediaries, who were in fact "selling" places at the queues.[246]

Another instrument related to the circular migration experience of the focus group participants was the *Karta Polaka*. Both Russians from Kaliningrad and Ukrainians used this instrument and found it very useful in aiding their circularity between Poland and their countries of origin. Furthermore, they shared that it saved them from having to go through many bureaucratic hurdles ("Queues, losses of documents, prolonging issue time, and all those horrible things"[247]), such as prolonged issuing time and fees that most of their friends faced when applying for residence permits.[248] One of the participants shared:

> "I obtained Karta Polaka and since then I had no problems with visas, because consulate has a very good attitude to Polish people. You come with Karta Polaka and all will be done fast and without any problems. There are some special regulations, which simplified the procedure and allowed to obtain visa in easier way. So it is not because they like us but there is a legislation which allows them to do it in this way".[249]

Another entry mechanism that was used by some of the participants was based on the granting of an educational visa, which led to a circular migration trajectory at a certain point in time. Some of them studied in Poland or were granted research/educational grants by Polish institutions. They returned to their countries of origin several times and then migrated back to Poland for employment purposes, where eventually they changed their status by applying for the EU long-term residence card in one of the cases or for the *Karta Polaka*.[250]

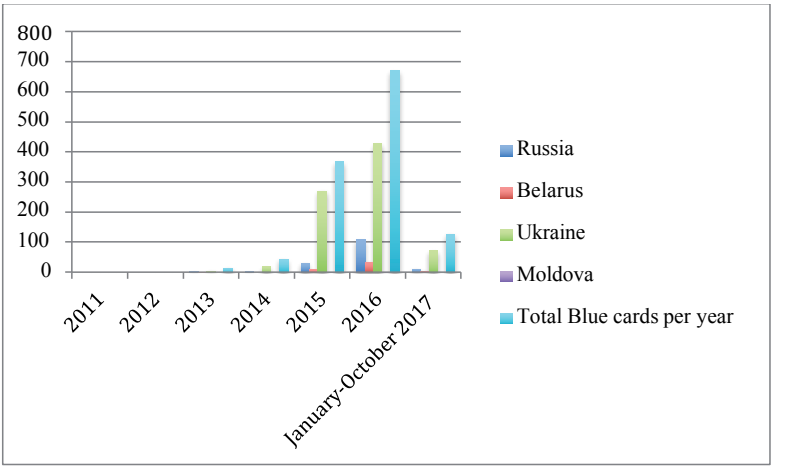
6.6.2. EU instruments

Blue Card Directive

Ukrainian and Russian migrants are the main users of the Blue Card instrument in Poland (see the graph below). According to the Foreigners' Office data, these

246 Interview # 1 with officials, Poland, November 2016, Annex II. Also in interview # 3 with civil society actor, Poland, November 2016, Annex II and Interview # 2 with academic, Poland, November 2016, Annex II.
247 Focus group with Russian migrants, Poland, November 2016, Annex IV.
248 Focus group with Russian migrants, Poland, November 2016, Annex IV.
249 Focus group with Russian migrants, Poland, November 2016, Annex IV.
250 Focus groups with Russian and Ukrainian migrants, Poland, November 2016, Annex IV

migrants work mainly as legal, social and cultural professionals, business and administration professionals, as well as in the IT sector.[251]



Graph 6.1. Blue cards issued per Eastern partnership country and Russia and total per year for the period 2011-2017. Source: Office of Foreigners.[252]

The conducted focus groups mainly covered participants who were supported by the IT company's relocation manager in the application process for the Blue Card permit. Yet, they also shared some experiences of their colleagues who had to apply by themselves at some point in time. Most of the participants explained that they were given a choice between the national and the EU Blue Card permits and that they were advised by the company that was recruiting them to apply for the Blue Card permit.[253] The rest had informed themselves about the advantages of the permit and even about the differences that existed in the EU Members States.

Most of them shared that what particularly appealed to them about the Blue Card permit was the fact that it provided a period of three months to look for a new job in case of unemployment, compared to the one month that was allowed under the national permit; furthermore, the validity of the Blue Card was for three years and the spouse was also entitled to the same duration of validity; the spouse was able to get unrestricted access to the labour market without the need to apply for

251 Office of Foreigners, The data was requested and received in October 2017.
252 The data was requested and received in October 2017.
253 Focus groups with Blue Card holders from Russia, Ukraine and mixed group of Russian speakers, Poland, December 2016, Annex IV. Interview with business representatives, Poland, December 2016, Annex II.

a work permit, as well as free access to education for the family members and finally, it was part of the EU system, which provides the holder with the opportunity to work in other EU Member States, where very often the IT companies have other branches.[254]

All applicants first apply for national visa D and enter Poland and stay initially on the basis of this visa. Some of them indicated that they had to go through a "probation period" and only received a labour contract a few months after their arrival, which would allow them to submit an application for the Blue Card permit.[255] According to the participants, it took on average six months from the moment of receiving the job offer to obtaining the Blue Card permit, from which two to three months (a maximum of up to four months) to receive the permit after the application.

Among the participants in the focus groups, there were Blue Card holders who received their permits in 2013 and considered themselves to be from the "first wave".[256] In the beginning they experienced problems with the procedure because the administration was still elaborating the application procedure, and because the relocation mangers from the IT companies did not have enough experience to handle the new system. For example, the first Blue Card holders had to go through an interview at the local authority and those who subsequently applied did not have to comply with such a requirement.

The main problems raised by the respondents with regards to the application procedure were caused by the condition to prove that the foreigner had a higher professional qualification, either through the completion of (at least) a three-year course of study at a higher education institution or through five years of professional experience in a field that was compatible with the profession. One of the respondents said that he decided to apply for a Blue Card permit through the procedure, taking into account his diploma because his education was directly related to the job position.[257] However, because the translation of his diploma did not contain the same words as the job description, the officer did not accept

254 Focus groups with Blue Card holders from Russia, Ukraine and mixed group of Russian speakers, Poland, December 2016, Annex IV.

255 Focus group with Blue Card holders: mixed group of Russian speakers, Poland, December 2016, Annex IV.

256 Focus groups with Blue Card holders: Ukrainian and mixed group of Russian speakers, Poland, December 2016, Annex IV.

257 Focus group with Blue Card holders: mixed group of Russian speakers, Poland, December 2016, Annex IV.

his documents and he had to apply on the basis of his professional experience by translating his "workbook".[258]

Some of the participants shared that in the beginning they did not know which documents would be considered as constituting solid proof, so they would submit documents proving both their education and professional qualification(s).[259] Another problem in this respect was outlined by one of the respondents that was caused by the nature of work of the IT specialists in Ukraine who very often work as sole traders/self-employed.[260] This would prevent them from evidencing their professional experience and if their diploma was not related to the job description in question, then their applications would be refused.

Another problem raised by one of the respondents concerned the lack of any possibility to start the process of applying for a Blue Card permit in the country of origin.[261] He shared that he was granted a six-month visa and when he arrived in Poland he was sent to the USA for a business trip for three months, which left him with only three months to apply and obtain the Blue card permit. In addition, he said that in this period before obtaining the permit he needed to additionally apply for a new visa in order to travel.

Other problems concerning the application process were related to the discretion of the regional authorities, which in turn led to the law being applied differently. The focus group respondents shared that their company was well-known to the authorities and at that time, the procedure in Krakow was the fastest one.[262] In other Polish cities, the waiting period could take up to nine months, even though most of the Blue Card permits were issued in Krakow.[263] The representatives of the IT company management that were interviewed shared that they had some problems with the issuing of the Blue Card permits for their employees in other cities where they had a branch, and had to intervene and explain to the officials what the rules were. For instance, in order to issue a (dependent) permit for the family member of a Blue Card holder, the authorities in question required that the Ukrainian marriage certificate had to be recognised under Polish law. The IT

258 According to one of the respondents: "Work book in Russia is the official CV from the Russian employer. It comes from the Soviet Union". From focus group with Blue Card holders: mixed group of Russian speakers, Poland, December 2016.
259 Focus group with Blue Card holders from Ukraine, Poland, December 2016, Annex IV.
260 Focus group with Blue Card holders from Ukraine, Poland, December 2016, Annex IV.
261 Focus group with Blue Card holders: mixed group of Russian speakers, Poland, December 2016, Annex IV.
262 Focus group with Blue Card holders from Ukraine, Poland, December 2016, Annex IV.
263 Focus group with Blue Card holders from Ukraine, Poland, December 2016, Annex IV.

company management representatives stressed that this was not an explicit legal requirement, yet the officers in this town would request it.[264] By way of contrast, the authorities in Warsaw merely required a sworn translation of the marriage and birth certificates respectively. There were also regional differences regarding the recognition of diplomas: some *voivodes* required confirmation by the Ministry of Science and Higher Education and others did not.

According to the IT company management representatives, the Polish officials did not always know what the law was and were afraid to issue the Blue Cards because they gave too many rights to foreigners and had to stay restrictive.[265] Therefore, the approach of the company was "to fix structural issues, not to survive".[266] Due to the lack of IT specialists on the Polish labour market, they pursued an active recruitment strategy and supported, both financially and logistically, their employees throughout the Blue Card permit application process. Part of their approach was to work with local authorities in order to share their best practices concerning the application of the law and explaining how the Blue Card Directive provisions were supposed to work in practice.[267] They stressed that the problems with the implementation of the Blue Card Directive in Poland and the wide discretion that the authorities had was due to the lack of a precise formulation of the requirements for granting a Blue Card permit. For instance, with regards to the qualifications, the law was silent on what constituted professional experience. In locations where the administration did not have any experience, they did not know how to interpret this kind of provision, which consequently led to lengthy delays in the application process.[268]

When asked whether they had returned back to their countries of origin for work, the respondents that did, said that they did it several times through the internal "home office" system that the company offered through its network of branches in the region.[269] This type of circulation did not create any problems relating to visas and taxation for the individuals concerned. Apart from that, most of the circulation of the Ukrainian Blue Card holders was due to personal reasons, but was not done very often because of the long queues at the border with Ukraine.[270] In two cases, the wives of the Blue Card holders went back and spent up to six months in

264 Interview # 22 with IT business management representatives, Poland, December 2016, Annex II.
265 Interview # 22 with IT business management representatives, Poland, December 2016, Annex II.
266 Interview # 22 with IT business management representatives, Poland, December 2016, Annex II.
267 Interview # 22 with IT business management representatives, Poland, December 2016, Annex II.
268 Interview # 22 with IT business management representatives, Poland, December 2016, Annex II.
269 Focus group with Blue Card holders from Ukraine, Poland, December 2016, Annex IV.
270 Focus group with Blue Card holders from Ukraine, Poland, December 2016, Annex IV.

their country of origin. The interviewed Russians, in general, were not interested in going back to Russia, mainly due to political reasons.[271] Some of them shared that they were afraid for their security and some of them stated they might get into financial trouble because of two Russian laws: the currency law and the tax law. The IT company management representatives shared that they were also not interested in having their employees circulating: "We don't need people to come here and work for only six or nine months. The key of our business is long term engagement".[272] However, they stressed that there were companies that focused mainly on short-term projects and which could benefit from this type of mobility. In general they stated, that what was needed was "a more flexible idea of movement".

EU Long-term Residence Directive

During the recruitment phase for the focus groups, it turned out be extremely difficult to find foreigners from Ukraine and Russia who had obtained the EU long-term residence permit and were also engaged in circular movement between Poland and their country of origin. Only one participant fitted that profile. However, her circular migration trajectory occurred before she was granted the permit. She explained that she deliberately decided to retain her Ukrainian citizenship, so that she would have the possibility to move between her country and Poland in the future.[273] The participant shared that after 20 years she still missed her country and would like to be able to spend some time there, but at the same time she had her place to live in Poland and "a fundament to rely on – employment opportunities, my friends".[274] Asked whether she was aware that she could lose her permit if she stayed longer than the allowed absence, she replied in the negative.

GAMM initiatives

Mobility partnerships

Even though under the GAMM's umbrella the *Oświadczenie* procedure currently covers five of the Eastern Partnership countries and Russia, in practice it is used for circulation purposes mainly by the citizens of the neighbouring countries. There are several reasons for that. Firstly, according to the experts that were interviewed, the act of extending the *Oświadczenie* procedure to the Eastern Partnership countries was a matter of foreign policy rather than a development that was

271 Focus group with Blue Card holders from Russia, Poland, November 2016, Annex IV.
272 Interview # 22 with IT business management representatives, Poland, December 2016, Annex II.
273 Focus groups with Ukrainian migrants, Poland, November 2016, Annex IV.
274 Focus groups with Russian migrants, Poland, November 2016, Annex IV.

driven by Poland's migration policy.[275] Therefore, this instrument was not advertised among the local population after the conclusion of the Mobility Partnerships with Armenia and Georgia.

Secondly, in practice it is mainly the nationals of the neighbouring countries, mostly from Western Ukraine, Kaliningrad and Belarus, who were interested in this type of migration because of the costs related to migration. Even though Ukraine is the only Eastern Partnership country that has not signed a Mobility Partnership, according to the official statistical data (see Table 6.1. above) and experts' opinion, Ukrainians were the main beneficiaries of this opportunity.[276] Some of the interviewed experts claimed that it was purposefully designed as a tool to primarily attract Ukrainians.[277] An official stressed that Ukrainians started to circulate between Poland and Ukraine as early as the 90s: "[i]t is not like we invented the system and they started to circulate".[278]

Therefore, in the border region between Poland and Ukraine, the employers from the agricultural sector benefited from well-established informal channels for recruitment through a network of bus drivers.[279] Employers contacted them and requested the number of seasonal workers that they needed. The bus drivers then proceeded to recruit the workers. The employers then registered their declarations at the Local Labour Office with their name, the bus drivers helped the workers with the visa applications and transported the workers to the employer's farm. Besides, more and more formal channels for recruitment opened in the preceding years, such as through Polish private recruitment agencies with recruitments offices in Ukraine.[280]

Another pull factor was the higher earnings that Ukrainians could make for a couple of months of work in Poland, which in turn enabled them to support their families when they went back home. Therefore, one employer that was interviewed stated "the ones who need some additional money would come for 1 or 1,5 months to pick apples or strawberries. A pensioner would get around 300 zloty

275 Interview # 1 with officials, Poland, November 2016, Annex II; Interview # 4 with expert, Poland, December 2016, Annex II; Interview # 18 with official, Poland, November 2016, Annex II.
276 Interview # 2 with academic, Poland, November 2016, Annex II; Interview # 10 with staff member of a private recruitment agency, Poland, October 2016, Annex II.
277 Interview # 1 with officials, Poland, November 2016, Annex II; Interview # 15 with academic, Poland, November 2016, Annex II; Interview #4 with expert, Poland, December 2016, Annex II.
278 Interview # 1 with officials, Poland, November 2016, Annex II.
279 Interview # 9 with official, Poland, November 2016, Annex II.
280 Interview # 10 with staff member of a private recruitment agency, Poland, October 2016, Annex II.

(70 EUR) as a pension and would earn about 80-100 zloty (19-24 EUR) per day in Poland".[281]

One of the interviewed stakeholders stressed that there was a project implemented by the Armenian organisation ICHD which aimed to match European employers with Armenian job seekers.[282] Even though the established system as a result of the project (called "Ulysses") was "very informative", it did not lead to a significant increase in the number of Armenians that were willing to come and work in Poland (see Table 6.1. above). The interviewee claimed that the distance was one of the main obstacles because travelling from Armenia to Poland was expensive. Along with the geographical proximity, Poland attracts Ukrainians because of the historical, cultural and linguistic proximity that exists between the two countries.[283]

Multi-entry visa under the Visa Facilitation Agreements

One of the participants in the Russian focus group shared her experience with multi-entry visas under the Agreement between the European Community and the Russian Federation on the facilitation of the issuance of visas to citizens of the European Union and the Russian Federation. The participant, who was from Kaliningrad, shared that these types of agreements simplified the entry procedure and "really facilitate it for people from Russia and Ukraine, as it is easier for them to get visa and they can avoid issuing residency card".[284] She was eligible for a multi-entry visa for a period of several years. After a change of the local consul, whom started to demand more additional documents and due to the changed nature of her work in Poland, which required longer periods of stay there, she decided to apply for a Pole's Card in order to be able to circulate between the two countries without encountering any problems.[285]

6.7. Assessment

The presented data demonstrates that Poland facilitates entry for nationals of Eastern Partnership countries and Russia through both national and EU visa policy

281 Interview # 9 with official, Poland, November 2016, Annex II.
282 Interview # 10 with staff member of a private recruitment agency, Poland, October 2016, Annex II.
283 Interview # 10 with staff member of a private recruitment agency, Poland, October 2016, Annex II. See also Kindler, Kordasiewicz, and Szulecka, 'Care needs and migration for domestic work: Ukraine-Poland'.
284 Focus group with Russian migrants, Poland, November 2016, Annex IV.
285 Focus group with Russian migrants, Poland, November 2016, Annex IV.

instruments, as well as on the basis of national mechanisms such as the *Oświadczenie* procedure and the *Karta Polaka*, which is in line with the benchmarks of this study. It is gradually liberalising access to its labour market on the basis of wide spectrum of exemptions from work permit applications and through the performance of a labour market test regulated through bylaws. Nevertheless, even these channels for facilitated entry do not remedy migrants' problems relating to finding employment, which in turn makes individuals use fake declarations as part of the *Oświadczenie* procedure as mechanism to gain entry. It is expected that the visa liberalisation with Ukraine will bring positive changes in this regard and help migrants to establish a first contact with potential employers. At the same time, it is still unclear how the transposed Seasonal Workers' Directive and the reformed *Oświadczenie* procedure will be implemented in practice.[286]

The interviewed migrants used both the *Karta Polaka* and the *Oświadczenie* procedure as circulation-friendly instruments as part of their changing migrant-led trajectories. In addition, the multi-entry visa under the Visa Facilitation Agreement with Russia stands out as an EU instrument that has also been used. On the contrary, even though it provides for flexible geographical mobility, the Blue Card instrument is not used for circular migration purposes *per se*. The Blue Card holders that wish to spend time working in their countries of origin, use the company's internal "home office" mechanisms to circulate back and forth. Outside of this practice, however, they are not interested in circulating for work, mainly due to political and economic factors. EU long-term residence permits do not seem to be an attractive tool for circulation for settled migrants in Poland either. The only interviewed migrant, who fitted the required profile for the focus groups, used her permit to maintain her transnational links with her country of origin but did not consider work-related circulation. Lastly, the Local Border Traffic agreement with Ukraine cannot be directly used for circular migration related to work, but it can lead to the initiation of circular migration because it provides job-seeking opportunities. Nevertheless, in order to gain insights into its implementation, one needs to conduct targeted filed research in the border region, which is a matter that falls outside the scope of this research.

286 At the time of writing the directive was not transposed yet. However, it became clear that there will be two different permits: one for seasonal workers and another permit for the *Oświadczenie* procedure, which will be slightly reformed but kept.

6.8. Work authorisation – instruments at the EU and national level

6.8.1. National instruments

According to Para 1 (20) of the Order of the Minister of Labour and Social Policy of 21 April 2015, concerning cases of commission of work to foreigners in the territory of the Republic of Poland (referred to as the *Oświadczenie procedure*), the migrant workers can perform work within six months "independent of the number of entities entrusting work to them". The only requirement is that "before the commencement of work by a foreigner the Local Labour Office, competent with respect to the place of residence or seat of the employer, has registered in writing the entity's declaration of intention to commission work to the foreigner concerned".[287] Even though the Order does not explicitly provide for a change of employer, the fact that foreigners could have a number of declarations registered, allowing work for several employers simultaneously, is used for that purpose.[288] This practice can also be used to avoid unemployment. However, unemployment would lead to violation of the work visa authorisation on the basis of the *Oświadczenie*, which from 2018 onwards will be monitored through a new Central Registration Data Base brought about by the pending amendments of this procedure.

Furthermore, migrant workers who have legally worked for more than three months with the same employer on the basis of a registered declaration can apply for a work permit (through their employer) or a single permit, without the need to leave the territory of the country. This possibility is stipulated in the Regulation of the Minister of Labour and Social Policy of 29 January 2009 on defining the cases in which a work permit is granted regardless of the specific rules for issuing work permits to foreigners,[289] issued on the basis of Article 90, Para 5 of the Act on Employment Promotion and Labour Market Institutions. According to the provisions of Paragraph 3, a labour market test is not required in cases when a foreigner has worked for more than three months for the same employer and has worked in the same position throughout the duration of the *Oświadczenie* procedure directly before filing the application for granting a work permit.[290] In order to benefit from this exemption, the foreigner must present the registered declaration to the Local Labour Office, as well as a contract and documentation

287 Para 1 (20) of the Order.
288 Interview #1 with officials, Poland, November 2016, Annex II. Interview #12 with civil society actor, Poland, November 2016, Annex II.
289 Dziennik Ustaw, No. 16, item 85 (2009) as amended.
290 Kozak, Tota, and Wojcik, *Long-term Residence of Foreigners in Poland in the Light of Act on Foreigners of 12 December 2013,* p. 152.

evidencing the payment of social security contributions.[291] Another exemption in this regard concerns nationals from the countries covered by the *Oświadczenie* procedure who provide care and nursing services or who are household staff for natural persons in a household.

Since foreigners who have obtained the *Karta Polaka* are entitled to take up employment on the territory of Poland without the need to apply for a work permit and carry out an economic activity on the same conditions as those applicable to Polish citizens,[292] they do not face any restrictions regarding the change of employer or occupation. In addition, the only limitation on them is the validity of their visas, which means that there are no consequences if they lose their jobs.

6.8.2. EU instruments

Blue Card Directive

Article 133, Para 2 of the Foreigners Act transposed Article 13 of the Blue Card Directive, allowing the Blue Card holders to retain their permits in case of unemployment for a period of three months within the validity of the permit. However, the period in which the foreigners remain unemployed can only occur a maximum of twice and for no longer than a combined duration that exceeds three months[293] within the period of validity of the permit. [294] To benefit from this exception, the foreigners need to notify the competent *voivode* within 15 working days that they have lost their job.[295]

During the first two years of their stay in Poland on the basis of a Blue Card permit, the foreigners cannot change their employer, the position for which they are employed and they cannot receive a lower salary than the one specified in the permit without an amendment to the permit by the respective *voivode*.[296] In line with Article 135, Para 1 of the Act on Foreigners, the permit can be amended by the competent *voivode* at any time. After the first two years, foreigners are required to only inform the competent *voivode* about any changes concerning position, remuneration and other conditions specified in the permit.[297]

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291 Ibid.
292 European Migration Network, 'Visa policy as migration channel in Poland. National report', p. 21.
293 Unterschütz, 'National Report on Implementation of EU Migration Directives in Poland', p. 186.
294 Article 133, Para 2 (2) AF.
295 Article 134, Para 1 AF.
296 Article 135, Para 2 AF.
297 Unterschütz, 'National Report on Implementation of EU Migration Directives in Poland', p. 136.

Single Permit Directive

According to Article 123 of the Foreigners Act, the single permit cannot be revoked within 30 days from the date of the loss of the job, if the foreigners notify the competent *voivode* of the loss of job indicated in the permit. The notification needs to be carried out within 15 days from the loss of the job (Article 121). This provision, however, cannot apply more than once during the period of validity of the permit (Article 123, Para 2). It is on the basis of this provision that the foreigners can change their employer or jobs, in case working conditions are unfavourable or if the worker receives a better job offer elsewhere.[298] However, this means that they need to start a new procedure for the issuing of a single permit, which in addition also requires the performance of a labour market test in line with Article 125 of the Act on Foreigners.

Researchers' Directive

The Foreigners Act in Chapter 7, part V on the temporary residence permit for the purpose of conducting research does not legislate for any change of host research institution and the legal consequences for the researcher in case of unemployment, e.g., where the host research institution loses its authorisation. This means that in such cases, according to general rules, if the grounds for issuing the permit are no longer valid, the permit should be withdrawn and the foreigner should return to the country of origin within 30 days.

6.9. Work authorisation – implementation dynamics

6.9.1. National instruments

The interviewed migrants and NGO representatives did not report any problems concerning their change of employer or any unemployment they faced during the authorised period under the *Oświadczenie* procedure. However, two other problematic issues relating to the implementation of the *Oświadczenie* procedure were identified. Firstly, the fact that the procedure is regulated by a Ministerial Order and does not explicitly stipulate any provisions on change of employer and sector, naturally creates legal uncertainty for the migrant workers. The Ministry of Labour and Social Policy issued interpretative guidelines on the application of the *Oświadczenie* procedure, which are in practice a non-legally binding set of

298 Ibid., p. 181.

recommendations.[299] According to the interviewed officials, they were inspired by one of the Local Labour Offices, which gave the idea to the Ministry on how to restrict and regulate the application of the *Oświadczenie* procedure.[300]

On the basis of these interpretive guidelines, the Local Labour Offices were using their discretion to apply or issue their own interpretation of the Order that in some of the cases differed so much that it was compared to the "invention" of new legislation.[301] The Local Labour Office in Warsaw, for example, introduced restrictions that were not provided in the Order, such as a cap on the number of *Oświadczenie* that one employer could obtain, and a requirement that the company should be in operation for at least one year. According to the interviewed officials, in cities like Warsaw where there were many migrants and problems that were well-known to the labour officers meant that they were free to check, ask questions and require additional documentation as a means of control (but they could not refuse to register a declaration).[302] In the offices that were located in the countryside, the application procedure differed because the labour market situation was diverse. Therefore, the application of the *Oświadczenie* procedure was left to the consideration of the Local Labour Offices.[303] However, this flexibility caused problems for the rights of migrant workers. For instance, the interviewed NGO representative stressed that they could not argue or appeal any negative decisions because they were very technical and the procedure was not regulated by the general normative act on employment.[304]

The second major problem with the implementation of the *Oświadczenie* procedure was the wide spread abuse of migrant workers due to the fact that they often work irregularly. In the sectors of agriculture, construction and domestic services it was even the case that the Polish nationals were working irregularly because it was too expensive to legally employ workers due to the high financial burden stemming from taxation and social security obligations, as well as onerous bureaucratic hurdles.[305] An interviewee said that it was common for employers to abuse Ukrainian workers by not paying their last salary because they knew that

299 Interview #1 with officials, Poland, November 2016, Annex II. The guidelines contained mainly issues to be verified and possibility to refuse registration. Interview #1 with officials, Poland, November 2016, Annex II.
300 Interview #1 with officials, Poland, November 2016, Annex II.
301 Interview # 12 with civil society actor, Poland, November 2016, Annex II.
302 Interview #1 with officials, Poland, November 2016, Annex II.
303 Interview #1 with officials, Poland, November 2016, Annex II.
304 Interview # 12 with civil society actor, Poland, November 2016, Annex II.
305 Interview # 5 with civil society actor, Poland, November 2016, Annex II. Interview #12 with civil society actor, Poland, November 2016, Annex II.

their visa was expiring and they could not do anything because they had to leave the country.[306] But even more severe cases of exploitation were recorded. For example, several Ukrainian workers were forced to work in a cigarette factory without any payment. Their passports were taken away from them and they were promised payment only at the end of their stay in Poland.[307]

According to one of the interviewed NGO representatives, the Ukrainian circular migration pattern was always based on legal entry into Poland and irregular work.[308] Before Poland's accession to the EU, Ukrainians did not require a visa to enter Poland. Once Poland introduced visas, the state had to invent another special instrument to allow people to enter and work by introducing another ground for issuing a visa. The fact that this instrument was functioning for more than ten years and given that there was no political will to change it meant that: "we are really eager to see immigrants from Ukraine working illegally in Poland because it's cheaper, it's better for Polish economy, it's better for Polish employers and it's very convenient not to interfere in this interaction, not to assist any migrants because otherwise we could be seen as country who exploits immigrants".[309]

6.9.2. EU instruments

Blue Card Directive

One of the big advantages of this permit according to the interviewed migrants was that it gave them the right to change employer and be unemployed for up to three months.[310] Most of the focus group participants knew that the single permit holders could not benefit from these favourable conditions and needed to restart the whole procedure again, if they wanted to change their employer. Nonetheless, the Blue Card holders that were interviewed emphasised that outside their company, which provided a relocation manager to support them in the application process, their colleagues who wished to change their employer had to carry out the procedure by themselves and faced bureaucratic hurdles, long queues and some of them had to switch to a single permit and restart the whole procedure.[311]

306 Interview #11 with trade union representative, Poland, November 2016, Annex II.
307 Interview #11 with trade union representative, Poland, November 2016, Annex II.
308 Interview #12 with civil society actor, Poland, November 2016, Annex II.
309 Interview #12 with civil society actor, Poland, November 2016, Annex II. Interview #11 with trade union representative, Poland, November 2016, Annex II.
310 Focus groups with Blue Card holders: mixed group of Russian speakers, Russians and Ukrainians, Poland, December 2016, Annex IV.
311 Focus group with Blue Card holders from Ukraine, Poland, December 2016, Annex IV.

Another problem shared by the focus groups participants from Ukraine was that changes in the employment conditions (position, salary, another contract) had to be notified to the *voivode* and that the allowed changes were capped. They even gave an example of a colleague of theirs who was promoted and declined the position because he did not want to start the procedure all over again and "there is no guarantee the second time it will also be a Blue Card". The interviewed IT company management representatives confirmed that this requirement "in terms of flexibility, it is a blocker".[312] Therefore, they used some "loopholes" in the law because if they followed it strictly, they would not have been able to change position within the company.

Single Permit Directive

One of the Russian participants in the focus groups remarked that the introduction of single permits worsened the situation because "they bound the employees to their employers".[313] He explained that if one wanted to change employer, then one had to restart the whole single permit application procedure from the outset: "but who wants to do that?". He also emphasised another impediment: in order to get a work permit for certain professions, one's salary needed to match a set threshold.[314] Another interviewee stressed that the introduction of the single permit had "very negative consequences" because once the migrants decided to change their job, change their position within the company, the type of contract within the company or if their salary decreased in one of the companies they worked at, then they would have to apply for a new single permit.[315] The whole process could take up to one year from the moment of submission until the moment of receipt, "which is already official information from the Head of the Office of foreigners in Warsaw".[316] In case the validity of the single permit had expired, migrants could work on the basis of the *Oświadczenie* procedure but they had to apply for a visa to do so. After 2014, due to the conflict in Ukraine, Ukrainian men were gener-

312 Interview # 22 with IT business management representatives, Poland, December 2016, Annex II.
313 Focus group with Russian migrants, Poland, November 2016, Annex IV.
314 The focus group respondent is referring to the fact that in order to obtain a work permit, the amount of remuneration specified in the contract with the foreigner cannot be lower than the salaries of other employees performing work of comparable type or in a similar position.
315 Also stressed in Interview #12 with civil society actor, Poland, November 2016, Annex II and Interview #5 with civil society actor, Poland, November 2016, Annex II.
316 Interview # 3 with civil society actor, Poland, November 2016, Annex II.

ally not willing to go back home and re-apply for a visa because they were sent subpoenas as part of the ongoing mobilisation to join the Ukrainian army.[317]

The NGO representative mentioned that the transposition of the directive itself created a "traffic jam" in the administration and that "it works really, really slow, sometimes unpredictable".[318] One strategy that is currently employed by migrants who want to change their single permit is to apply for a separate work permit for their second/new job at the very same time as applying for a new single permit to keep their work legal while they are waiting for the single permit to come through. This costs extra money for the applicants. Before the introduction of the Single Permit Directive, the procedure cost 340 złoty (80 EUR). Currently one needed to pay 440 złoty (104 EUR) and the employer had to pay a further 100 złoty (23,50 EUR) to obtain a work permit.

The interviewee also declared that some companies preferred to keep the migrant workers out of legal employment during the period before obtaining a work permit because the employee was tied to the company: "they are quite sure that they won't leave them until they get at least the permit and they will be working without taxes and social security contributions".[319] Nevertheless, the foreigner was trapped:

> "because even if he could change the employer while the procedure lasts, he still has to have somebody to employ him, to run the labour market test for him, to resubmit application and also to submit documents saying that he quitted the job because afterwards the procedure can be cancelled".[320]

In this period the migrants were not officially unemployed because they were waiting for their new single permit, and nor could they be employed because one needed to have a visa or a work permit to do so according to the applicable Polish legislation. They were working without an official contract on the black market. According to the interviewed NGO representative, migrants preferred this mechanism rather than going back to their country of origin and having to wait four

317 For more info, see world.24-my.info, 'Ukrainians receive the agenda in army: who, when and how will be taken to military units', 27 April 2017, retrieved at; http://world.24-my.info/ukrainians-receive-the-agenda-in-army-who-when-and-how-will-be-taken-to-military-units/ (accessed 12 may 2017).

318 Interview # 3 with civil society actor, Poland, November 2016, Annex II.

319 Interview # 3 with civil society actor, Poland, November 2016, Annex II.

320 Interview # 3 with civil society actor, Poland, November 2016, Annex II.

months without an opportunity to plan anything before the visa was either granted or refused.[321]

Researchers' Directive

The interviewed migrants who were working as researchers possessed either the *Karta Polaka* or EU long-term residence and did not report any problems associated with changing employer, which is not surprising given the fact that for the former category there are not any explicit regulations on change of employer and for the latter, there are no restrictions. The 2014 implementation Plan for the "Migration Policy of Poland: current state of affairs and postulated actions", envisaged the abolishment or reduction of fees for the issuance of a temporary residence permit for researchers arriving in Poland with the aim of conducting research.[322] This was due to the fact that many researchers preferred to reside in Poland on the basis of a long-term visa because it was free of charge, rather than on temporary residence permit, which had the effect of placing them in precarious position. This would have had a positive impact on researchers, who would have been required to change their research institution and restart the whole permit application procedure. Nevertheless, as already stressed, the government repealed this policy in 2016 and it is not yet clear whether there will be any measures in this regard in future.

6.10. Assessment

The presented analysis showed that the flexibility of the *Oświadczenie* procedure, allowing for access to employment in all industries and occupation without any restrictions, unemployment, as well as change of employer, comes at a certain cost. This national mechanism is regulated through a ministerial order and does not explicitly provide for all of these rights. In addition, the unlawful practice of the Local Labour Offices to introduce additional requirements by interpreting the order by the Minister of Labour and Social Policy leads to different standards being applied in different places and causes legal uncertainty for both employers and migrant workers. Furthermore, the lack of enforcement mechanisms to control whether the migrants are working on the basis of contracts results in "tacit tolerance" of irregular work under the *Oświadczenie* procedure, which has been going on for almost a decade.

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321 Interview # 3 with civil society actor, Poland, November 2016, Annex II.

322 Implementation Plan for the "Migration Policy of Poland: current state of affairs and postulated actions"/ „Polityka migracyjna Polski – stan obecny i postulowane działania", p. 30.

Among the EU instruments, the Blue Card Directive has been transposed correctly and allows for changes to both the employer and legislates for any periods of unemployment. However, there are problems with its implementation in Polish law and practice. The Blue Card holders who cannot rely on the support of the company when they wish to change employer also face bureaucratic hurdles and some of them have even lost their status, which goes against the original aim of the directive. Article 12 (2) of the Directive leaves it to the national procedures of the Member States to stipulate the requirements for prior authorisation or communication of the changes concerning the admission conditions during the first two years of employment. Poland has introduced a cap on the permitted changes to the employment conditions during the first two years, which is a condition that disincentivizes migrants from changing their jobs and which ultimately undermines the *effet utile* of the directive.

According to the interviewees, the transposition of the Single Permit Directive has made the situation worse for migrant workers. The cumbersome national procedure to change employer or sector very often traps migrants into a semi-irregular status, which again is conducive to abuse and exploitation.

6.11. Residence status – instruments at the EU and national level

6.11.1. National instruments

As was already mentioned above, migrant workers who have worked legally for more than three months under the *Oświadczenie* procedure with the same employer on the basis of a registered declaration, can directly apply for a work permit or single permit, without the need to leave the country. Both procedures provide for an accumulation of residence periods and can lead to permanent residence, depending on the individual cases, either through the national or through the EU long-term residence procedures. Holders of a valid *Karta Polaka* who plan to settle permanently on the territory of Poland are also eligible to apply for permanent residence in line with Article 195, Para 1 (9) of the Foreigners Act. The application is free of charge and after the permit has been granted, the foreigners and their family members can benefit from financial assistance for a period of up to nine months.[323]

323 This provision came into force on 01.01.2017. Act of 13 May 2016 amending the Pole's Card Act and certain other acts. Dziennik Ustaw, item 753 (2016).

The national permanent residence permit is issued only for specific categories of foreigners: children or spouses of Polish citizens and foreigners with a *Karta Polaka* who want to settle permanently, foreigners of Polish origin, victims of trafficking, tolerated residence permit holders and persons with granted refugee status, as well as with subsidiary protection and humanitarian reasons permit.[324] Depending on the different categories, foreigners can also be required to have stayed continuously on the territory of Poland for between one and ten years. Article 196 of the Act on Foreigners elaborates upon the grounds for refusing to initiate the proceedings to grant this type of permit, such as when the foreigner resides irregularly or on the basis of a Schengen visa for humanitarian reasons due to the interest of the state or international commitments or on a temporary residence permit due to circumstances requiring a short-term stay, as well when the individual serves a sentence of imprisonment or detention.[325] In addition, Article 197 of the Act lists the grounds for refusal including, amongst others, cases when the foreigner does meet the substantive law criteria mentioned above, his or her data is registered in the SIS for the purposes of refusing entry or is considered undesirable, as well as when the application contained fraudulent data or documents, or when the foreigner is in tax arrears.[326]

The migrants need to file their permanent residence application in person, subject to some exceptions, in the respective *voivode* no later than on the last day of their lawful stay in the territory of Poland.[327] They need to present, as part of the application, documentation justifying the granting of the permit, such as information on foreign travel and any stays abroad that occurred within five years prior to filing out the application and whether they were detained or sentenced to any period of imprisonment.[328] The procedure for granting the permit should be concluded within a maximum of three months from the initiation of the application.[329]

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324 Article 195 AF.

325 For more details, see Article 196 AF and Kozak, Tota, and Wojcik, *Long-term Residence of Foreigners in Poland in the Light of Act on Foreigners of 12 December 2013,* pp. 195-196.

326 For more details, see Articles 197 and 198 AF. For revocation grounds, see Article 199 AF.

327 Article 202 AF.

328 For detailed info on the required documents as part of the application, see Article 203 AF.

329 Article 210 AF.

6.11.2. EU instruments

EU Long-term Residence Directive

The foreigners who are not eligible for the national permanent residence procedure are able to rely on the EU long-term residence permit procedure. According to Article 211 of the Foreigners Act, this permit is granted to foreigners at their request for an indefinite period of time, if they have been staying in Poland legally and uninterruptedly for a minimum of five years before filing the application and meet the following criteria: have a source of steady and regular income sufficient to cover subsistence costs for the sponsor and the family members, as well as health insurance or a document certifying that the costs of treatment in Poland will be covered by the insurer. The income requirement is specified in Article 114 (2) of the Foreigners Act stating that the monthly income shall be higher than the amount which would entitle a person to access cash benefits from the social assistance system, as specified in the Act of 12 March 2004 on Social Assistance[330] with respect to the sponsor and each dependent family member. Foreigners must have maintained steady and regular income for three years of stay in Poland immediately before filing the application.[331] With regards to Blue Card holders, however, only two years of stable income is required.[332] This requirement for steady and regular income of three years can be considered proportional based on the CJEU judgment in the case *Khachab* on the Family Reunification Directive, which can be applied by way of analogy also to the EU Long-term Residence Directive since the wording of the income requirement is almost identical in both directives.[333]

The five-year period of stay on the territory of Poland includes the total period of legal stay in the EU for Blue Card holders, if they have resided on the territory of Poland for a minimum of two years immediately before filing the application[334] and half of the period of legal stay in Poland in cases when they were residing on the basis of visas or temporary residence permits for the purposes of obtaining higher education or vocational training.[335] The foreigners' stay, which is the ground for granting them the EU long-term residence permit, is considered uninterrupted if none of the intervening intervals were longer than six months and all the intervals were no longer than ten months within the required five-year

330 Dziennik Ustaw, item 182 (2013) as amended.
331 Article 211, 2 (2) AF.
332 Article 211, 2 (1) AF.
333 Case C-558/14, Khachab, ECLI:EU:C:2016:285, paras. 41-48.
334 Article 211, 1 (1) AF.
335 Article 211, 1 (3) AF.

period.[336] In the case of Blue Card holders, the five-year period is considered uninterrupted if none of the intervening intervals exceed 12 months or where all intervening intervals were no longer than 18 months in total.[337] These rules do not apply, however, when the intervals were due to the performance of professional duties or work outside Poland under an agreement with an employer established on the territory of Poland, where the family members were accompanying a foreigner performing the abovementioned activities or in cases of exceptional personal situations requiring the foreigner's presence outside Poland for up to six months or for internships or classes provided for in the course of studies by a Polish university.[338]

Foreigners will be refused an EU long-term residence permit when they do not meet the above-mentioned requirements and when it is justified by national security or defence, as well as by the protection of public safety and order.[339] However, these grounds cannot be relied on for economic purposes.[340] A long-term residence permit will be granted by way of decision by the competent *voivode*.[341] The foreigner then needs to file an application and present documentation similar to that required under the national permanent residence procedure.[342]

6.12. Residence status – implementation dynamics

6.12.1. National instruments

According to the interviewed experts, the migrants who worked on the basis of the *Oświadczenie* procedure did not usually face any problems in obtaining a work permit or a single permit with the same employer.[343] One of the experts stressed that the proof that this legal possibility was working well, was given by the fact that in the last two years Ukrainians who used to circulate on the basis of work visas, started to change their legal statuses to more stable single temporary permits, which then made them eligible to apply for a long-term or permanent

336 Article 212, 3 (1) AF.
337 Article 212, 3 (2) AF.
338 Article 212, 1 AF.
339 Article 214, 1 AF. For refusal grounds to initiate proceedings on granting the permit see Article 213 AF.
340 Article 214, 2 AF. For revocation grounds, see Article 215 AF.
341 Article 218 AF.
342 Article 219 AF.
343 Interview # 12 with civil society actor, Poland, November 2016, Annex II.

residence.[344] This "massive growth in temporary permits" was mainly due to the political situation in Ukraine at the time. Most of the people who wished to switch to a work or single permit, were fleeing from western Ukraine and they tried to make sure that they would be allowed to stay in Poland in case the conflict expanded. They were eager to pay much more money for the temporary permits and go through the procedure, "which is not as easy and nice as Oświadczenie", in order to secure a more stable status in Poland.[345]

The focus group recruitment strategy did not aim to cover migrants who were holders of the national permanent residence permit. Nevertheless, one of the Russian focus group participants, working for a business corporation, mentioned that she planned to apply for a permanent residence permit in the following year.[346] According to her, the most important prerequisites for obtaining the permit were to have a work contract, preferably a permanent work contract, as well as to demonstrate that the applicant had paid taxes in the previous years. She stressed that her employer offered her a permanent contract and paid all the required ZUS (social security contributions), as well as obtained private medical insurance. Her plan was to obtain permanent residence as a step towards gaining the Polish nationality, which would allow her to gain employment at the EU institutions, where she would receive a much better salary for the same position and tasks. She further stated, "That is why permanent residence permit and Polish citizenship is some kind of breakthrough to another level".[347]

6.12.2. EU instruments

The highly-skilled and low-skilled migrants shared different experiences regarding the process of obtaining an EU long-term residence permit. One highly-skilled Ukrainian who participated in the focus group did not report any problems concerning the application process for the permit.[348] What she complained about was the constantly evolving legislation, which made it very hard to make an informed decision.[349]

344 Interview # 12 with civil society actor, Poland, November 2016, Annex II.
345 Interview # 12 with civil society actor, Poland, November 2016, Annex II.
346 Focus group with Russian migrants, Poland, November 2016, Annex IV.
347 Focus group with Russian migrants, Poland, November 2016, Annex IV.
348 Focus group with Ukrainian migrants, Poland, November 2016, Annex IV.
349 The participant referred to a period of more than 20 years, since she was living in Poland.

A Russian respondent in the focus groups shared that he could not choose between the EU and the national permit because he did not have "Polish roots" nor had he done "anything outstanding for Poland". Therefore, he had to apply for the EU long-term residence permit and remarked that it was more difficult to obtain this permit. The respondent stressed that the *voivode* examined his monthly income from the last three years on the basis of the submitted *PIT* (tax return declaration). His income could not be less than 468 złoty (110,50 EUR) per family member and at the beginning of the process his salary was slightly lower, which rendered him ineligible for the permit.

The participant in the Russian focus group said that the main problem with obtaining this permit was the dependency on the employer. For instance, if the employer did not pay the required taxes or social security contributions for the worker, even for a period of two months, this would cause the applicant to fail the permit procedure. However, in most of the cases, employers demanded that migrants performing low-skilled jobs in restaurants or in the construction sector pay all social security contributions due themselves.[350] The respondent stressed that he had been working and paying *ZUS* (social security contributions) on his own for three years and this is how he managed to obtain a long-term resident status. He added: "If it is a low-skilled work, not in a corporation, employers won't hire you or you will be required to pay them back ZUS".

The requirement for continuous employment *(nieprzerwane zatrudnienie)* constituted another hurdle for those wishing to obtain the long-term residence permit.[351] If migrant workers became unemployed, they had to report this change in their status to the *voivode* and were given only one month to find a new job. So one could have worked for several years, striving to become eligible for a long-term residence permit, but if finding a new job took more than one month, one became unemployed and could not subsequently obtain this status. The respondent also stressed that the transposition of the Single Permit Directive had led to more dependency on the employer due to the bureaucratic procedure for changing employment and that migrants who wished to apply for a long-term residence permit preferred to stay with the same employer rather than risk changing their permits and ending up with a period of unemployment.

When the interviewee was asked whether he had circulated at any point during this five-year period required for long-term residence, the Russian respondent said

350 Focus group with Russian migrants, Poland, November 2016, Annex IV.
351 Focus group with Russian migrants, Poland, November 2016, Annex IV.

that he was aware of the limits to absence from the Polish territory and therefore he purposefully spent most of his time in Poland.[352] Some of the interviewed Blue Card holders also shared this concern. Even though none of them were eligible to apply for a long-term residence permit at the time of the interviews because they came to Poland roughly 1.5 - 2 years ago, most of them envisaged applying for this permit at some point in the future. According to the IT company management representatives, most of their employees were interested in obtaining an EU long-term residence permit in order to reduce the bureaucracy surrounding the renewal and extension of the Blue Card.[353] Furthermore, from the management's perspective it was more convenient if the workers had a more permanent and stable status because this would allow them to travel and to move with greater ease to different location as may be required by the needs of the company. Therefore, the IT company was investing in retaining the Blue Card holders in the country through the provision of Polish language classes that were free of charge to the Blue Card holders and their spouses, as well as support for the spouses to find a job and through the introduction of a simplified procedure for getting a mortgage to buy real estate.

6.13. Assessment

The presented analysis demonstrates that the Polish legislation provides for mechanisms that allow individuals to change from a temporary status, such as work on the basis of *Oświadczenie,* to a single residence permit, which is in line with the benchmarks in this policy area. No problems were registered with regards to this transition. In practice this meant that traditional circular migrants were given the opportunity to change their trajectory as a result of the altered contextual circumstances. The conflict in Ukraine made them initiate a process of securing a more stable status as a safety strategy in case the political situation in Ukraine deteriorated. This gave them the option to decide whether to continue to circulate or to settle and start accumulating residence periods that would enable them to qualify them for permanent residence permits and provide a path to citizenship.

Nonetheless, the second transition from a single to a long-term residence permit creates problems for the migrant workers, mainly due to the high dependency on the employer that is created by the Single Permit Directive and the demanding requirements that are stipulated in the transposed text of the Long-term Resi-

352 Focus group with Russian migrants, Poland, November 2016, Annex IV.
353 Interview with IT business management representative, Poland, December 2016, Annex II.

dence Directive, especially for workers occupying low-skilled positions. Furthermore, the risk of interrupting the required five-year period for long-term residence prevents all categories of migrants from engaging in circulation throughout the duration of this period, if they have decided to settle. Therefore, circulation and accumulation of residence periods are mutually exclusive paths within the Polish framework. Finally, even though the legislation provides for a clear path to long-term residence once the migrant has a single permit, this is a "bumpy" road and facilitation to permanent residence is accessible only for migrants with Polish roots or those who have made outstanding contributions to Poland.

All of the presented instruments allow for free movement rights within Poland and a choice of residence within the country, and migrants did not report any problems in this regard.

6.14. Social security coordination – instruments at the national level[354]

Poland has concluded a total of eight bilateral social security agreements,[355] two of which have been signed with Eastern Partnership countries - Ukraine and Moldova.

The interviewed Polish ministry official shared that the agreements concluded by Poland were always based on the fundamental principles of coordination of social security systems that are contained in Regulation No. 883/2004: the principle of equal treatment; the principle of the export of benefits and the principle of the aggregation of insurance periods.[356] The personal scope of the agreements covers all persons (not only nationals) who are or have been subject to the legislation of one or both contracting parties, as well as other persons who derive rights from such persons.

The material scope of the two agreements with Poland cover old-age pensions, invalidity pensions, pensions in respect of accident at work and occupational diseases, and survivors' pensions, which are also exportable benefits.[357] In addi-

354 This section is part of a forthcoming publication in a Special Journal Issue of the European Journal on Social Security.

355 The rest are with Yugoslavia (currently refers to: Bosnia and Herzegovina, Serbia and Montenegro), Macedonia, Canada, USA, Republic of Korea and Australia.

356 Ibid.

357 Agreement between the Republic of Poland and the Republic of Moldova on Social Insurance, Article 2 and Article 5. Agreement between the Republic of Poland and the Republic of Ukraine on social security, Article 2 and Article 5.

tion, the agreement between Ukraine and Poland has broader material scope, which also includes unemployment benefits, maternity and paternity benefits, sickness cash benefits and death grants.[358] This agreement allows for export of maternity and paternity benefits and sickness cash benefits.[359]

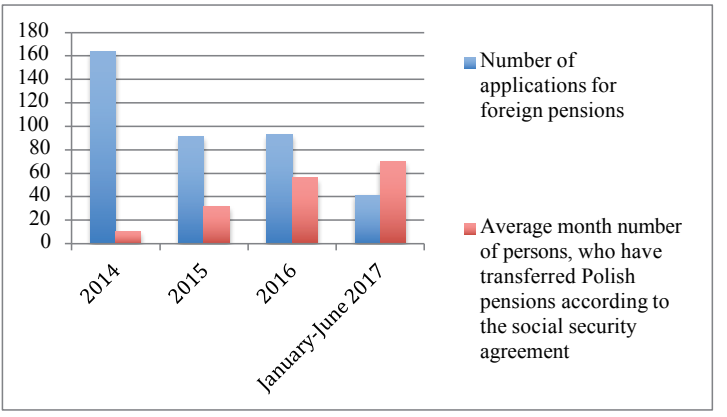
According to Article 132 of the Polish Act on retirement pensions and disability pensions from the Social Security Fund of 17th December 1998, even when there is no bilateral agreement with a particular third country, the payment of old-age and disability pensions is still possible in Poland: "At the request of a retiree or pensioner living abroad the pension shall be received by a person authorised to receive the pension, who is domiciled in Poland or into the account of the retiree or pensioner in his/her country, unless international treaties provide otherwise".[360] In practice this means that Polish pensions are transferred to the state of residence of the pensioner only if there is bilateral agreement on social security between Poland and the respective state. However, when there is no agreement and the pensions are not transferable, they can be paid in Poland to a person that is authorised by a pensioner who resides in the territory of Poland, or to the bank account of the respective pensioner in Poland.

There are no legal provisions stipulating the possibilities for the reimbursement of social security contributions, which are not accessible to migrants.

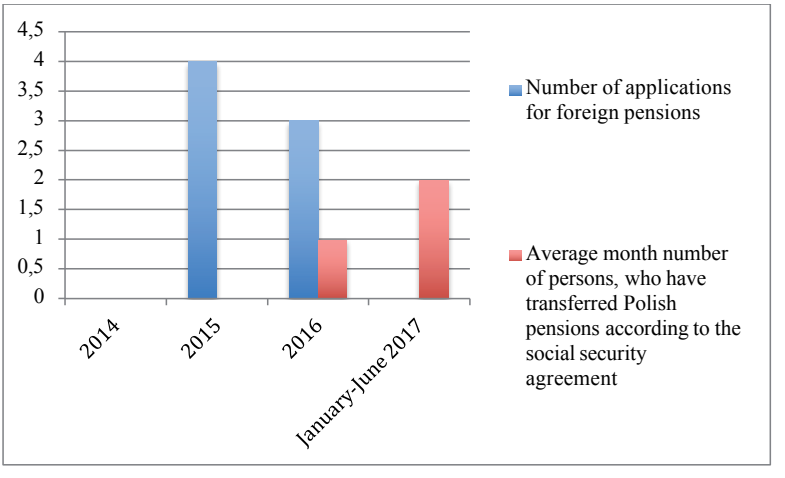
6.15. Social security coordination – implementation dynamics

According to the data provided by the Polish Ministry of Labour and Social Policy, the number of persons, who have transferred Polish pensions according to the social security agreement with Ukraine, (on the basis of a monthly average) were 11 in 2014, 32 in 2015 and 56 in 2016 and 70 until the end of June 2017. On the basis of the agreement with Moldova, only one person had transferred their pension in the period between the beginning of 2014 to 2016 and two until June 2017.[361]

358 Article 2 of the Agreement.
359 See National Contact Point to the European Migration Network in Poland, 'Migrant access to social security in Poland' (2014).
360 Interview # 13 with official, Poland, December 2016, Annex II.
361 Interview # 13 with official, Poland, December 2016, Annex II.



Graph 6.2. Data on the implementation of the social security agreement between Poland and Ukraine. Source: Polish Ministry of Labour and Social Policy.[362]



Graph 6.3. Data on the implementation of the social security agreement between Poland and Moldova. Source: Polish Ministry of Labour and Social Policy.

The results from the conducted focus groups with migrants in Poland showed that the levels of awareness about the existence and the aims of the social security bilateral agreements are very low. Only two Ukrainian participants from the two conducted general focus groups in Poland knew something on this subject.[363] One of the Ukrainians informed himself through a TV programme, "where lawyers

362 Data retrieved from the interviewed official at the Polish Ministry of Labour and Social Policy, 20 September 2017.

363 Focus groups with Russian migrants and Ukrainian migrants, Poland, November 2016, Annex IV.

explained that there is an agreement between Poland and the Ukraine, and another one signed with the European Union, which states that if you work officially in Poland, then you should send your documents to the Ukraine and then you pay your contributions and you are entitled to your future pension, when you retire". The other participant in the focus group shared the experience of her mother who retired in Ukraine after working for ten years in Poland. The years that the mother worked in Poland were counted as a basis for her pension in Ukraine. The focus group participant was surprised by this positive development:

> "That's really strange because the ZUS (Zakład Ubezpieczeń Społecznych, Social Security Institution) in Poland is all mess and, as far as I know, they are even unable to calculate pensions transparently for Poles, let alone for Ukrainians. In the Ukraine, for its part, I can tell you from my experience that the institutions are also stubborn in accepting documentation proving that you worked ten years in Poland and count this experience as a basis to obtain pension in the Ukraine".

Several representatives of NGOs working on the "regularisation of migrants' stay" were also interviewed. Most of them were not confronted with social security coordination cases. One of the lawyers shared that since the conclusion of the agreement with Ukraine, they had very few social security cases and when they did, they mostly concerned problems with migrant workers who wanted to retire and were having trouble collecting all the documents needed to be able to benefit from the provisions of the bilateral agreement.[364]

One Blue Card holder who took part in the Ukrainian focus group stated that he knew about the agreement between Poland and Ukraine and that he was interested "only in calculating the years of experience".[365] In addition, only one participant in the Russian focus group had heard about such a possibility in the context of persons moving from Kazakhstan to Russia and supposed that such instrument would exist for his benefit.[366] Most of the participants mentioned that they were not interested in this issue because the pensions that they would get from both Poland and Russia were extremely low (250 EUR in Poland and 200$ (170 EUR) in Russia). One of the participants said: "So anyway you should have at least two flats - one for renting and one for living".[367]

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364 Interview # 13 with civil society actor, Poland, November 2016, Annex II.
365 Focus group with Blue Card holders from Ukraine, Poland, December 2016, Annex IV.
366 Focus group with Blue Card holders from Russia, Poland, December 2016, Annex IV.
367 Ibid.

Some of the factors contributing to the low awareness among the interviewed Blue Card holders may be the fact that they moved to Poland relatively recently, on average between 1.5 - 2 years before the interviews were held. In addition, most of them were young people at the beginning of their career. Finally, most of the Russian Blue Card holders did not want to return to Russia and some of them stressed that they did not want to have anything to do with the Russian authorities.

6.16. Assessment

The presented data shows that the bilateral agreements concluded by Poland with the Eastern Partnership countries contain provisions regarding the equality of treatment; maintenance of the acquired rights and rights in course of acquisition under their legislation, the totalisation of insurance, employment or residence periods and of assimilated periods for the purposes of the acquisition, maintenance or recovery of rights and for the calculation of benefits, as well as for the export of benefits. All these fundamental principles, used as benchmarks in this study and which are also contained EU social security law, are applied when concluding bilateral agreements in practice.

One of the benchmarks that is not fulfilled by Poland, is the possibility for the reimbursement of social security contributions in cases where the migrants and their families cannot access benefits due to waiting periods in the host country or the lack of a bilateral agreement providing for the export of benefits.[368] This is a provision contained in Article 27 (2) of the UN Convention on the Protection of the Rights of all Migrant Workers and the Members of Their Family. This standard was among the measures proposed by the European Commission in its Communication to foster circular migration[369] and should be especially considered in cases relating to the short-term circular migration of seasonal workers.

Regarding the material scope, all agreements between Poland and the Eastern Partnership countries cover the export of pensions – old age, invalidity pensions, disability pensions in respect of accident at work and occupational diseases and survivor's pensions. Apart from this, the agreements with the different countries vary. It seems that for the Ukrainian state the export of unemployment benefits is

368 A recommendation in this regard is also expressed by Verschueren, 'Employment and Social Security Rights of Third-Country Labour Migrants under EU Law: An Incomplete Patchwork of Legal Protection', p. 407.

369 European Commission, Communication Migration and Development: Some Concrete Orientations, COM (2005) 390 final, Brussels, 1.9.2005, p. 28.

important because it is provided in the agreement between Ukraine and Poland. Finally, none of the agreements provide for the export of health care benefits, which can put migrants in a vulnerable position because they might experience periods without possessing sufficient health coverage.

Lastly, the benchmark framework includes instruments that can support the implementation of the international standards in a given policy area: multilateral and bilateral agreements on social security. The paper demonstrates that the number of the bilateral agreements is low, despite the cultural, historical and geographic proximity of the countries in the Eastern Partnership bloc. One of the obstacles that needs to be taken into consideration, is that the political relations between the countries will also have an impact on the conclusion of these instruments. Therefore, it is not very likely that one will witness an agreement between Poland and Russia being concluded in the near future, especially after the events in Crimea and the suspension of the Local Border Traffic Agreement between Poland and Russia in 2014.

Another problem is related to the implementation of these instruments. The lack of awareness among the interviewed migrants, as well as the low numbers of beneficiaries of the agreements, means that there is a need for an active information policy on these issues, which are very technical and not easily understandable by migrants who do not necessarily have a good level of the local language. Migrants need to be actively informed about their rights during their circulation. Waiting until the age of retirement could mean a loss of entitlement or problems created by the lack of documents that need to be presented to the respective social security institutions.

6.17. Entry and residence conditions for family migrants - instruments at the EU and national level

According to Article 159 of the Foreigners Act, family members are entitled to family reunification by obtaining a temporary residence permit. Family reunification is only possible with a foreigner who is resident in Poland on the basis of a permanent or long-term residence permit, who has been granted refugee or subsidiary protection status, a temporary residence permit with a duration of at least two years, which is valid for a period of not less than one year immediately before filing the family reunification application, a temporary residence permit for

conducting research, a Blue Card or a permit obtained for humanitarian reasons.[370] This means that foreigners residing on a visa, such as workers entering on the basis of the *Oświadczenie* procedure or holders of the *Karta Polaka,* who have not applied for permanent residence, are not eligible for family reunification.

In addition, the sponsor needs to have health insurance within the meaning of the Act of 27 August 2004 on Health Care Services Financed from the Public Funds or a document certifying that the costs of treatment in Poland will be covered by the insurer, as well as a source of steady and regular income sufficient to cover subsistence costs for the sponsor and the family members.[371] Finally, the family members need to have a guaranteed place of accommodation in Poland, which is certified by, *inter alia*, a housing rental agreement or statement from a hotel.[372]

The definition of a family member covers the spouse, whereby the marriage needs to be recognised under Polish law, and minor children of the foreigner and his/her spouse, including an adopted child and a dependent child of whom the foreigner has actual parental custody and a minor child of the spouse, including an adopted child, dependent on him/her, of who he/she has actual parental custody.[373]

A family member will be refused a temporary permit for family members if he or she does not fulfil the requirements for obtaining a single temporary permit that are stipulated in Article 100, para 1(1)-(5), (8) and (9) of the Foreigners Act.[374] The *voivode* is required to take a decision on granting a temporary residence permit within one month upon receipt of the documents, which can be extended in certain cases.[375] The fees that the foreigner needs to pay are 340 złoty (80 EUR) for stamp duty on the commencement of the proceedings to grant a residence permit that are payable at the moment of submitting the application and fee of 50 złoty (11 EUR) for the issuance of a residence permit that is payable at the moment of receiving of a positive decision (residence card template).[376]

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370 Article 159, Para 1 (1) AF.
371 Article 159, Para 1 (2) AF. For the determination of the income requirement, Article 114 (2) applies. See the section, describing the transposition of the EU Long-term Residence Directive above.
372 Article 159, Para 1 (3) AF. Jacek Białas et al., 'How to Make It in Poland – Information Brochure for Foreigners. Residence Legalisation and Employment', Warsaw, (2015).
373 Article 159, Para 1 (3) AF.
374 See the section on the transposition of the Single Permit Directive above. For the revocation grounds, see Article 166 AF.
375 See Article 109 AF.
376 Migrant.info.pl, 'Temporary residence permit for family members of a foreigner residing in Poland', retrieved at http://www.migrant.info.pl/temporary-residence-permit-for-family-members-of-a-foreigner-residing-in-poland.html (accessed 1 June 2017).

A temporary residence permit for family members of a foreigner residing in Poland can be granted while the family members are outside or already in Poland.[377] After a positive decision to issue a temporary permit by the *voivode* responsible for the place of residence of the foreigner, the family member who has been granted the permit can use this as a ground to apply for visa before a Polish consul. Upon their arrival in Poland, the family member needs to submit an application for the issuance of the card and give his or her fingerprints. The permit is issued for the period of validity of the sponsor's temporary permit or for three years in case the sponsor has been granted permanent or long-term residence in Poland.

6.18. Entry and residence conditions for family migrants – implementation dynamics

One of the Ukrainian circular migrants who participated in the focus groups planned to settle in Poland only, however, if he was able to reunite with his family.[378] He gained knowledge of the process because his friends went through the whole application procedure before him. He believed that the process worked and did not expect to face any problems. The Ukrainian participant described that the family had to apply for a visa in Ukraine, then move to Poland and apply for a residence permit based on the fact that he worked in Poland, "Then, the office issues a residence permit and the family starts living here – the kid goes to school as it is required by the law".

Yet, an interviewed NGO representative described a different picture in reality.[379] He did not see a lot of Ukrainians reuniting with their families in Poland because it was not easy to obtain a family reunification permit: "It requires money, it requires very high salary which usually they don't have. You need to prove, according to the directive, that you can support your family, so your salary should be quite substantial and most of them, even middle level sectors cannot do so". The NGO representative stressed that the EU directives were generally transposed in the Polish legislation by applying the minimum possible standard: "it's a translation, it's not really a transposition".[380] He explained that, therefore, most of the directives were translated and inserted into the Polish legislation, without any assessment as to whether they created workable solutions and fitted in the legal

377 Article 168 AF.
378 Focus group with Ukrainian migrants, Poland, November 2016, Annex IV.
379 Interview # 12 with civil society actor, Poland, November 2016, Annex II.
380 Interview # 12 with civil society actor, Poland, November 2016, Annex II.

act in question. The interviewee gave as another example the Employers Sanctions Directive, which according to his research had never been used in Poland.[381] He claimed that the way in which the directive was transposed actually violated the Polish legislative standards by introducing broad definitions and unclear provisions that were simply unworkable in practice. Furthermore, the penalties that were introduced as part of the transposition of the directive were not linked in any way to the Penal Code and as a result it was not used in practice.

Several interviewed NGO representatives said that due to the demanding requirements for family reunification, such as the condition of legal residence for two years, many of their clients were finding other ways to reunite with their families. Firstly, some reunited on the basis of a visa and afterwards stayed in Poland through a special temporary permit.[382] Usually one of the spouses had a work visa and the family member would apply for a visa based on a reason, which was not specified in the Foreigners Act in line with Article 60, Para 1 (25) thereof.[383] When the family member's visa was about to expire, the NGO advised their clients to apply for a temporary permit based on the other circumstances stipulated in Articles 186-187 of the Foreigners Act. This was in fact a residence permit, which does not give its holder the right to work in Poland. However, after two years, the sponsor could apply for a family reunification permit.

In order to obtain the "temporary permit based on other circumstances", the family members had to convince the inspector who analysed their case at the *voivode* by explaining their situation, e.g., that the husband was working and the wife was taking care of the child and that they had enough income to support themselves, "Then they analyse it. If they think it is enough, you can stay. It doesn't mean it always happens", "Sometimes they give a residence permit of parents who are here. If they are old and need their children to care for them, they can stay. That is an argument". [384]

By way of contrast, the interviewed Blue Card holders did not encounter any problems with the application process, which lasted on average between two and

381 For more details, see K. Słubik (ed.), Unprotected. Migrant workers in an irregular situation in Central Europe (Warsaw: Association for Legal Intervention, 2014).

382 Interview # 13 with expert, Poland, November 2016, Annex II; Interview # 5 with civil society actor, Poland, November 2016, Annex II; Interview # 6 with civil society actor, Poland, November 2016, Annex II.

383 Interview # 13 with expert, Poland, November 2016, Annex II.

384 Interview # 13 with expert, Poland, November 2016, Annex II.

four months.[385] They used both possibilities for family reunification: while the family members were already present in Poland, as well when their families were still in their country of origin. Some of them brought their family members to Poland on tourist visas and submitted the family reunification application after they received the Blue Card permit.[386] The main problem was not related to the application for the Blue Card itself but rather the visa application. One of the respondents said that his spouse had to wait roughly 2,5 months in order to get an interview by the Polish consulate in Ukraine.[387] According to him, this delay was caused by bribery practices as applicants were able to buy places in the queue. Another concern of the interviewed Blue Card holders was finding jobs for the spouses. One of the Ukrainians shared that his wife was a nurse and for her it would be difficult to find a job in Poland.

6.19. Assessment

The way in which the Family Reunification Directive has been transposed into the Polish Foreigners Act creates barriers and circumvention mechanisms for the migrant workers, especially for those who occupy low-skilled positions within the labour market. Firstly, seasonal migrants, "special purpose workers" and migrants residing on the basis of visas are excluded from the scope of the directive. This means that migrants working on the basis of visa issued in relation to the *Oświadczenie* procedure or holders of *Karta Polaka,* who have not applied for permanent residence, are not eligible for family reunification. They need to transfer to a single permit, in order to be able to apply for family reunification after two years in line with Article 8 of the directive. Poland makes use of this additional requirement, despite the Commission's recommendation that waiting periods should be as short as possible to avoid affecting family life in a disproportionate manner.[388]

Another obstacle preventing migrant workers in low-skilled sectors from applying for family reunification is the income requirement of approximately 110 EUR per month and per family member, as well as the family reunification fee of 95

385 Focus groups with Blue Card holders: mixed group of Russian speakers, Russians and Ukrainians, Poland, December 2016, Annex IV.
386 Focus groups with Blue Card holders: mixed group of Russian speakers, Poland, December 2016, Annex IV.
387 Focus groups with Blue Card holders: mixed group of Russian speakers, Poland, December 2016, Annex IV.
388 European Commission, COM (2014) 210 final, Brussels, 3.4.2014, p. 17.

EUR, which needs to be paid per person.[389] Even though the directive does not provide for family reunification fees, the Commission stated in its Guidance that fees required by Member States should not be excessively high so as to have the effect of hindering family reunification.

Despite the fact the Polish government does not see any problems with the application of the directive,[390] the presented data shows that migrant workers who wish to reunite with their families use the residence permit for "other" reasons, which helps them overcome hindrances caused by the long waiting period and the family reunification fees.[391] However, migrants still have to meet the same income requirements stipulated by the family reunification permit in the end. Furthermore, this practice creates legal uncertainty for the migrant workers who wish to reunite with their families.

The Polish legislation transposing the Family Reunification Directive makes it very difficult for low-skilled migrants to reunite with their families. By way of contrast, highly-skilled Blue Card holders do not face any restrictions and thus any problems in this regard. The interviewed migrants and experts did not share any problems regarding the accommodation requirements. Apart from that, the rest of the benchmarks in this policy area were not fulfilled. Family reunification is available only for Blue Card holders, whether they are circulating or not. On the contrary, the circular migration of low-skilled temporary migrants and family reunification are incompatible with each other according to the current legal framework.

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389 Michał Górski, 'Family reunification in practice – Polish case', MigrationOnline.cz, 9 May 2015, retrieved at: http://migrationonline.cz/en/family-reunification-in-practice (accessed 1 June 2017). See also MIPEX Poland, Poland Policy Scores (XLSX): Lawyers assisting migrants note that 456 złoty (or 110 EUR) per family member of net income after excluding rent or housing charges is difficult to meet for many migrant families.

390 See Polish responses to the questions posed by the European Commission in the Green Paper on the Right of Family Reunification of Third-country Nationals living in the European Union (Directive 2003/86/EC), COM (201) 735 final, retrieved at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-is-new/public-consultation/2012/pdf/0023/famreun/memberstatesnationalgovernments/poland_en.pdf (accessed 5 May 2017).

391 Michał Górski, 'Family reunification in practice – Polish case', MigrationOnline.cz, 9 May 2015, retrieved at: http://migrationonline.cz/en/family-reunification-in-practice (accessed 1 June 2017).

6.20. Recognition of academic and professional qualifications – instruments at the national level

6.20.1. Academic qualifications

The recognition of academic qualifications is regulated by Article 191a of the Polish Act on Higher Education of 27th July 2005. The law provides for two different recognition regimes: on the basis of national law and international agreements. Pursuant to Article 191a, Para 1 thereof, there is an automatic recognition of diplomas issued by an authorised higher education institution operating within the higher education system of a Member State of the EU, the OECD or the European Free Trade Association (EFTA) – party to the Agreement on the European Economic Area.[392] This means that if a degree gives access to further studies or the right to start doctoral studies in the country where it was awarded, it gives access to further studies at a given level or the right to start doctoral studies in Poland.[393] In case of doubt with regards to the appropriateness of the diploma or status of a foreign higher education institution that has issued it, upon a request of the institution concerned, the minister competent for higher education or an entity authorised by the minister will give their opinion on the matter or a certificate. [394]

In addition, pursuant to Article 191a, Para 7, international agreements determining equivalence provide another option for recognition of a higher education diploma or a professional title obtained outside Poland as equivalent to the relevant Polish diploma and professional title. Concerning the Eastern Partnership countries, as of 2005 Poland has concluded bilateral agreements on the recognition of education for academic purposes with Ukraine[395] and Belarus.[396] In December 2003, Poland ratified the Council of Europe/UNESCO Convention on the Recognition

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392 Interview # 13 with official, Poland, November 2016, Annex II. According to Article 191 a, Para 1 provides for the equivalence at the different levels: 1) a three-year degree programme or a first-cycle degree programme lasting at least three years, confirms in the Republic of Poland that its holder has a higher education at the level of the first-cycle degree programme; 2) a second-cycle degree programme confirms in the Republic of Poland that its holder has a higher education at the level of the second-cycle degree programme; 3) at least four-year long-cycle studies –confirms in the Republic of Poland that its holder has a higher education at the level of the second-cycle degree programme if it is recognized as equivalent to a diploma of completion of the second-cycle degree programme in the country in which it has been issued.

393 For details see, Article 191a, Paras 3 and 4.

394 Article 191a, Para 6.

395 Signed in April 2005, in force since 20 June 2006.

396 Signed in April 2005, in force since 12 December 2005. For full list of the bilateral agreements, see Ministry of Science and Education, 'Legal Acts', retrieved at http://www.nauka.gov.pl/en/recognition-of-academic-qualifications/legal-acts.html (accessed 5 May 2017).

of Qualifications concerning Higher Education in the European Region, which entered into force on the 1 May 2004.

Finally, if a particular country is not covered by an international agreement, pursuant to Article 191a, para 7, a higher education diploma or a professional title obtained outside Poland can be recognised through the nostrification procedure. The procedure is based on a Regulation issued by the Minister of Science and Higher Education.[397] Foreigners seeking the recognition of higher education diplomas that were obtained outside of Poland together with a title conferred as a result of this education, are required to submit an application initiating the nostrification procedure before a nostrification council. This is the council of the organisational unit of a higher education institution that is authorised to confer an academic degree of a *doktor* (PhD) in a given field of science or in a given field of art study, providing education in an area corresponding to a field of higher education study, the completion of which is confirmed with a diploma obtained abroad.[398]

During the procedure, the council compares the programme of study, the learning outcomes, the conferred rights and the duration of study, based on the documents attached to the application. The nostrification procedure ends with a resolution of the nostrification council no later than 90 days from the date of receipt of the application, when the formal requirements have been fulfilled.[399] In case of any differences in the course of study, learning outcomes or duration of study, the nostrification council may adopt a resolution putting the applicant under an obligation to pass the required examinations, determining the conditions therefor and the relevant time frames for completing those examinations.[400] In this case, the recognition procedure is completed within one month of the submission of the full application. The nostrification procedure ends with the resolution of the council on the recognition of the diploma as equivalent to the relevant Polish higher education diploma and professional title, or with a refusal to recognise

397 Regulation issued by the Minister of Science and Higher Education of 19th August 2015 on the nostrification of higher education diplomas obtained abroad and on confirmation of completion higher education studies at a given level of education pursuant to Article 191a (8) of the Act of 27th July, 2005 on higher education (Dziennik Ustaw, item 572 (2012) with subsequent amendments). See also Regulation of the Minister of Science and Higher Education of 8th August 2011 on the Nostrification of Academic Degrees and Degrees In the Area of Art Obtained Abroad.

398 Para 2 (1) of the Regulation. For the application and required documents see, para 2, (2) and (3) of the Regulation.

399 Para 4 (1) of the Regulation.

400 Para 4 (2) and (3) of the Regulation.

the diploma as equivalent to the relevant Polish higher education diploma and professional title.[401]

The applicant needs to pay a fee for the nostrification irrespective of the result of the procedure. The maximum amount of the fee is specified in relation to the minimum rate of basic pay due to a full professor as specified in the provisions governing the conditions of remuneration for work and other job-related benefits granted to staff members of public institutions of higher education and it shall not exceed 50% of this rate.[402] Therefore, the fee for the nostrification depends on the relevant educational institution consulted. According to an interviewed official, the fee cannot be more than 3000 złoty (700 EUR).[403] In contrast, the MIGRANT INFO website states that the fee generally varies between 2000-6000 złoty (470-1417 EUR).[404]

In the case of secondary education (e.g., concerning the profession of technician, which is referred to as a secondary level profession) this procedure is not implemented by the Universities but by the local authorities through an administrative decision. [405]

6.20.2. Professional qualifications

Professional qualifications obtained in third countries are recognised in Poland in accordance with national legislation. How the professional qualification is recognised in Poland generally depends on whether the profession is regulated. In the case of unregulated professions, the employer takes a decision on the recognition of the foreign qualification. The latter may decide to require confirmation of

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401 Para 5 (1) of the Regulation. Pursuant to Para 5 (2): The nostrification council shall refuse recognition of the diploma as equivalent to the relevant Polish higher education diploma if:
1) the institution which has issued the diploma or the institution which has provided the education:
a) were not on the date of issuing the diploma accredited higher education institutions within the meaning of domestic law of the countries in whose higher education systems the institutions operate, or implemented a course of study which was not accredited on the date of issuing the diploma, or
b) do not operate in a higher education system of any country;
2) the institution which has issued the diploma implemented a study programme or its part in the territory of another country inconsistently with the provisions in force within this country;
3) the applicant has failed to fulfill the obligations laid down in the resolution mentioned in § 4 (3).

402 Para 7 (1) of the Regulation.

403 Interview # 13 with official, Poland, November 2016, Annex II.

404 Migrant.info.pl, 'Nostrification of diplomas', retrieved at http://www.migrant.info.pl/Nostrification_of_diplomas.html (accessed 2 June 2017).

405 Interview # 13 with official, Poland, November 2016.

the equivalence of the migrant's educational qualification with the relevant Polish award or an opinion on the level of education obtained outside Poland through the procedure for academic recognition described above.[406] One of the interviewed officials said that some of the *voivodes* also sought confirmation of the equivalence within the Blue Card application procedure.[407]

Foreigners wishing to practice a regulated profession need to have their foreign certificate or higher education diploma recognised in the first instance. Only then can they can apply for the professional rights in accordance with the regulations pertaining to the exercise of a given profession in Poland.[408] For example, the conditions to obtain the right to practice the professions of a physician are: possession of a medical diploma awarded outside the EU, which has been recognised through a nostrification procedure at a Medical University in Poland as being equivalent to a Polish medical diploma, the completion of an obligatory post-graduate internship, lasting 13 months (*staż podyplomowy*), a positive result in the Final Medical Exam (*Lekarski Egzamin Końcowy*), appropriate physical or mental health, an impeccable ethical attitude and a sufficient command of the Polish language, which is certified by an examination organised by the Polish Supreme Chamber of Physicians and Dentists in Warsaw.[409]

Foreigners who have their diplomas recognised, and who have passed the Polish language examination and satisfied the health and ethical requirements can apply to the Regional Chamber of Physicians and Dentists for obtaining a limited right to practice the profession in order to complete the postgraduate internship or apply to the Minster of Health for recognition of previous professional experience or an internship completed abroad that is equivalent to the Polish internship. After the completion or the recognition of the internship, a positive result in the Final Medical Exam and provided that the ethics and health conditions are still satisfied, the foreigner can apply to the Regional Chamber of Physicians and Dentists for a right to practice the profession and can then subsequently become a member of the Regional Chamber. In addition, the foreigners also need to present a document certifying their right to reside in Poland.[410]

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406 Migrant.info.pl, 'Nostrification of diplomas', retrieved at http://www.migrant.info.pl/Nostrification_of_diplomas.html (accessed 2 June 2017).

407 Interview # 13 with official, Poland, November 2016.

408 Migrant.info.pl, 'Nostrification of diplomas', retrieved at http://www.migrant.info.pl/Nostrification_of_diplomas.html (accessed 2 June 2017).

409 For more details, see Act of 5 December 1996 on doctors' and dentists' professions, Dziennik Ustaw, No 277, item 1634 (2011) with subsequent amendments.

410 Interview # 20 with professional body representative, Poland, December 2016, Annex II.

The conditions for practicing the profession of a nurse are very similar to the criteria that are applied for physicians. They are stipulated in the Act of 15 July 2011 on nurse and midwife professions. The limited right to exercise the profession is granted on the basis of a command of the Polish language,[411] a nursing certificated recognised as being equivalent to those issued in Poland, unlimited legal capacity and satisfactory health conditions that are conducive to the exercise of the nursing profession.[412] After obtaining the limited right to exercise the profession, the nurse is directed by a District Chamber of Nurses to participate in an obligatory six-month adaptation internship in a healthcare facility. Upon completion of this internship, assuming that the nurse has a residence permit in Poland, and displays impeccable ethical conduct and has not been deprived of the right to practice in his/her country of origin and provided that all other requirements are still satisfied, the foreigner can be granted a right to practice the profession by the District Chamber of Nurses.[413]

6.21. Recognition of academic and professional qualifications – implementation dynamics

None of the participants in the focus groups were working in regulated professions. One of them had a professional qualification to work in a regulated profession (e.g., one of the participants was a construction engineer) but she could not find a job either in Ukraine or in Poland and was not interested in pursuing that career anymore.[414] Apart from one participant who mentioned that the recognition of her Ukrainian diploma took a very long time, none of the other interviewees reported problems in this regard.[415]

The interviews with experts, involved in the process of academic and professional recognition, however, revealed the cumbersome procedures that migrants face if they wanted to work in a regulated profession. One of the main challenges was the equivalence of degrees. For example, an interviewed official stressed that the education for becoming a physician required six years of study and if a third-country national just had a bachelor degree, it would not be possible to have the

411 Pursuant to the Act of 7 October 1999 on Polish Language (Dziennik Ustaw, No 43, item 224 and No 84, item 455 (2011) and item 1132 (2015).
412 Article 36 ANMP. The health conditions are certified through a medical check. Interview # 21 with professional body representative, Poland, November 2016, Annex IV.
413 Article 35 ANMP.
414 Focus group with Ukrainian migrants, Poland, November 2016, Annex IV.
415 Focus group with Ukrainian migrants, Poland, November 2016, Annex IV.

qualification recognised as being equivalent to the Polish medical degree.[416] Such foreigners could be admitted to a Polish university, take additional exams and obtain a medical degree in Poland. This did not pose a problem for recent graduates. Still, according to the interviewee's experience, migrant doctors who had exercised this profession for a longer period could find it challenging to go back to university. In addition, they were no possibilities for those who were not full doctors to work on the Polish labour market.

The interviewees shared that nurses coming from the Eastern Partnership countries generally faced problems with the recognition of their academic degrees.[417] The ones coming from Ukraine very often had graduated from a secondary education school that was later upgraded to a higher education.[418] Nevertheless, in order to practice the profession of a nurse in Poland, one had to have at least a bachelor level and more than 90% of the Ukrainians did not possess this. This meant that their degree could not be nostrified and that they had to enrol in a bachelor's program and complete their studies either in Ukraine or in Poland. According to the interviewed representative of the professional body, a better option for the nurses was to complete their studies in Poland because this would exempt them from the requirement of undertaking an additional internship and the Polish language exam.[419] The professional body would recommend the latter option to the applicants even though it was more costly because it gave nurses a degree which would be recognised throughout the EU. When there was a possibility of having some of the subjects recognised by the university in Poland, this would have the effect of shortening the study period.[420]

Another challenge, related to the recognition of the academic qualifications on the basis of the nostrification procedure was the time it took to complete.[421] The universities sometimes did not have the capacity to finalise the procedure within the three-month period due to the great amount of foreigners applying for recognition. Since the adoption of the nostrification Regulation, according to the interviewee, the universities saw many applications from Ukraine, Belarus and other post-Soviet countries and they gained knowledge about the programmes, their

416 Interview # 19 with official, Poland, November 2016, Annex II.
417 Interview # 19 with official, Poland, November 2016, Annex II; Interview # 21 with professional body representative, Poland, November 2016, Annex II; Interview # 11 with trade union representative, Poland, November 2016, Annex II; Interview # 5 with civil society actor, Poland, November 2016, Annex II.
418 Interview # 21 with professional body representative, Poland, November 2016, Annex II.
419 Interview # 21 with professional body representative, Poland, November 2016, Annex II.
420 Interview # 21 with professional body representative, Poland, November 2016, Annex II.
421 Interview # 19 with official, Poland, November 2016.

differences and knew what to expect (see Table 6.2. on data on foreigner doctors). Thus, the procedures for the new graduates were quicker. Yet, the nostrification procedure was beset with difficulties when it came to dealing with older qualifications. If there were substantial differences regarding the learning outcomes and the direction of the studies, the applicants needed to make up for the differences and they had to pass an examination. The university decided on a case-by-case basis what the differences were, what exams migrants had to take and what the time frame for this was.

Country/Year	2010	2011	2012	2013	2014	2015
Belarus	5	10	15	19	14	23
Ukraine	34	39	51	85	107	105
Russia	6	4	3	1	5	3

Table 6.2. Top 3 countries of origin of foreign doctors in Poland. Source: Central Register of Physicians and Dentists, Poland.[422]

The requirement for command of the Polish language in the academic qualification process was another challenge that was identified by the interviewed official.[423] The interviewee stressed that not all universities would allow the foreigners to take the required exams in Polish. In addition, the fees also constituted a burden. When the first big wave of foreigners applied for recognition of their medical qualifications after Poland's accession to the EU, "universities were charging for everything".[424] The Regulation put a limit on the amount of the fees that could be collected for the nostrification procedure. However, applicants had to pay for the additional courses and for the language exam, which for doctors cost 400 złoty (94 EUR). In addition, sometimes the obligatory internships were not remunerated, which placed additional financial burden on the applicants.

422 Information provided by the Polish Chamber of Physicians and Dentists.
423 Interview # 19 with official, Poland, November 2016, Annex II.
424 Interview # 19 with official, Poland, November 2016, Annex II.

Number of doctors practicing in Poland /Year	2010	2011	2012	2013	2014	2015
Total Number of licensed medical doctors	134247	135861	137447	139612	141292	143157
Total Number of professionally active medical doctors	121597	123281	125073	127183	129031	131059
Total Number of licensed foreign-trained medical doctors	2795	2403	2422	2464	2486	2537
Total Number of professionally active foreign-trained medical doctors	2487	2172	2203	2265	2302	2358
Newly registered practicing professionals	3574	3782	4048	4163	4326	4482
Number of annually registered foreign-trained medical doctors	70	87	82	137	157	158
Number of annually registered foreign-born medical doctors	110	110	127	160	166	173
Number of annually registered foreign-national medical doctors	74	92	95	120	128	120

Table 6.3. Number of doctors practicing in Poland per year. Source: Central Register of Physicians and Dentists, Poland.[425]

These cumbersome procedures raised a logical question about the interplay of the entry and residence requirements for migrants and the conditions for the professional qualifications recognition process, which gives access to a regulated profession. One of the interviewed lawyers stressed that these type of professionals could not come to Poland and start working immediately.[426] Therefore, what they did was enter on the basis of a visa, such as through the *Oświadczenie* procedure or *Karta Polaka*, to work for example as a domestic worker, use a permit for different work or one that was not work-related (e.g., for family reasons). Once they arrived in Poland, they commenced the recognition procedure, looked for a job or started working, in most of the cases in positions that were at a level below their qualifications.[427] They also started to learn the language because this was another barrier to practicing a regulated profession. The interviewed representative of the physicians' professional body confirmed that, to his knowledge, the Blue Card procedure was not used in the doctors' profession because doctors could not be hired without

425 Information provided by the Polish Chamber of Physicians and Dentists.

426 Interview # 13 with expert, Poland, November 2016, Annex II.

427 Interview # 13 with expert, Poland, November 2016, Annex II; Interview # 21 with professional body representative, Poland, November 2016, Annex II; Interview # 6 with lawyers, Poland, November 2016, Annex II; Interview # 5 with a civil society actor, Poland, November 2016, Annex II.

having obtained the right to practice, which could take between six months and three years depending on the nature of the individual case.[428]

Asked whether they had come across any migrants who have managed to recognise their degrees and were circulating, one of the interviewees said that nurses were investing so much time, effort and money into getting the right to practice, that their main goal was to stay in Poland.[429] Another interviewee said that he did not think that the circular migration concept was feasible with regards to doctors.[430] A civil society representative stressed that the few nurses who she knew successfully went through the whole recognition process and obtained a Polish diploma and then ultimately moved to Germany to gain a higher salary. [431] She stressed that even nurses who were interested in circulating back and forth between Poland and Ukraine would face additional bureaucratic hurdles because the newly obtained Polish diploma needed to be recognised again in Ukraine due to the lack of a special agreement to facilitate this process.

The interviewed official said that the existing policies for academic recognition were not working fast enough and that a new law on higher education that would make the procedures more flexible was currently in the pipeline. On the other hand, the professional bodies did not plan any specific measures in order to foster the procedure for the recognition of professional qualifications of foreigners. The interviewee stressed that they still had doubts as to whether the requirements in certain Member States were met and they did not have any knowledge or control over the medical requirements in countries outside the EU.[432] His experience showed, for example, that the specialist training that the doctors coming from the Eastern Partnership countries usually had, was at a lower level in comparison to what was required in Poland, which in practice required additional exams in order to obtain recognition of the relevant diploma.

6.22. Assessment

Poland's legislation is in line with the international standards with regards to the recognition of qualifications by providing several regimes for the recognition both at the international and national level. Furthermore, concerning the academic qual-

428 Interview # 20 with professional body representative, Poland, December 2016, Annex II.
429 Interview # 21 with professional body representative, Poland, November 2016, Annex II.
430 Interview # 20 with professional body representative, Poland, December 2016, Annex II.
431 Interview # 5 with a civil society actor, Poland, November 2016, Annex II.
432 Interview # 20 with professional body representative, Poland, December 2016, Annex II.

ifications, policy makers have assessed the need for new, more flexible legislation in order to be able to respond to higher demand for recognition of diplomas by foreigners. Against this background, however, international cooperation with the Eastern Partnership countries is not as intensive as one would assume, taking into consideration that most of the migrants coming to Poland come from Ukraine. Except for the bilateral agreements on the recognition of education for academic purposes between Poland on one hand, and Ukraine and Belarus on other, there are no other instruments aiming to facilitate the cumbersome procedures for the recognition of qualifications. The main reason behind the absence of such specific measures is rooted in the fact that the need to attract foreign specialists is still not articulated either at the level of the professional bodies or at political level. [433] Therefore, the different stakeholders provide information and consultation to foreigners coming to Poland or going back to their countries of origin but there is no proactive policy in this regard.[434]

The existing policies for the recognition of qualifications are conducive to circumvention practices, allowing migrants to enter Poland and start the procedure for recognition. Migrants are pushed to work in jobs that they are over-qualified for in order to be able to complete the recognition process. The cumbersome, lengthy and expensive procedures make them settle rather than prone to circulate. Therefore, it is not surprising that the number of foreign-trained doctors is rather low (see Table 6.3). If policy makers want to permit the circulation of health specialists, for example, they need to seek the establishment of special mechanisms, such as bilateral agreements between two countries that has the effect of fostering the recognition process.

6.23. Conclusions to Chapter 6

The Polish case illustrates that existing patterns of spontaneous circular migration can be facilitated through flexible legislation or policy measures. Ukrainians and nationals of the other neighbouring countries were engaged in circular migration through the porous Polish borders for decades. It was not until the barriers erected by the Schengen *acquis*, that the Polish government had to create compensatory measures, which were later on labelled as circular migration measures and placed under the EU circular migration umbrella. Both the *Oświadczenie* and the *Karta Polaka* procedures allow for easy entry and re-entry conditions, for change of

433 Interview # 20 with professional body representative, Poland, December 2016, Annex II.
434 See also MIPEX, 'Poland – Policy Indicators', retrieved at http://www.mipex.eu/poland (accessed 11 November 2017).

employers and transfer to settlement permits. However, in the case of the *Oświadczenie* procedure, beyond the benchmarks of the current research, this flexibility comes at a certain price, which is currently paid by the migrant workers.

Most of the interviewees pointed out the abuse of migrant workers' rights as the main problem arising out of the *Oświadczenie* procedure. There are several reasons for that. Firstly, this procedure is not regulated in a general normative act, e.g., in the Act on Foreigners or Employment. It started as a pilot policy measure regulated on the basis of one paragraph in an order issued by the Minister of Labour and Social Affairs, which was additionally interpreted through the adoption of guidelines at both the ministerial and local labour office level. Ten years later it continues to function on the basis of this single paragraph in a ministerial order. The discretion provided to the local authorities and the unlawful practice of some of the Local Labour Offices to introduce additional requirements by interpreting the order has led to different applications of this procedure at times, which is conducive to legal uncertainty and violations of the rights of migrants. Furthermore, it does not provide for any mechanisms for legal redress.[435] Currently, there is no control over the number of declarations registered and migrants employed, the legality of the work, the working hours, the level of the wages, or the provided accommodation.[436] It seems that the state is mostly interested in controlling the legality of entry, which explains why the border guards are becoming more and more strict in checking the registered declarations.[437] This is why one of the interviewees stressed that the *Oświadczenie* procedure is probably the best example of circular migration in the EU but the question was: was the government facilitating it or allowing it to happen?[438]

Secondly, Poland has still not developed a comprehensive national labour migration policy. The developed measures, which are labelled as part of a circular migration policy, are driven by foreign policy considerations and a pragmatic approach to the labour market needs. Poland has created the *Oświadczenie* mechanism to mainly attract Ukrainians, who "have filled the urgent gap which appeared but it is not part of a sustainable policy".[439] However, to make this an official part of a migration policy and regulate it in the Act of Foreigners or Employment requires a "mental change" in the Polish society and in the attitude of the policy makers,

435 Interview # 12 with civil society representative, Poland, November 2016, Annex II.
436 For more details, see W. Klaus, 'Polish Employers Compliance with Migrating Workers Rights', Warsaw, (2012).
437 Interview # 12 with civil society representative, Poland, November 2016, Annex II.
438 Interview # 12 with civil society representative, Poland, November 2016, Annex II.
439 Interview #4 with expert, Poland, December 2016, Annex II.

which is currently "for zero immigration for settlement".[440] The *Oświadczenie* procedure is suitable for this present climate because it makes the Ukrainian migration invisible.[441] It is not a political but a technical question of providing the necessary foreign labour force for the short term. However, it does not provide a long-term solution and is not part of a sustainable migration policy. The foreign policy driven extension of the *Oświadczenie* procedure to almost all Eastern Partnership countries illustrates that this instrument attracts mainly Ukrainians due to the geographic and cultural proximity, as well as the economic differences between Ukraine and Poland. The citizens of the other Eastern Partnership countries that are using it, approach it as entry mechanism rather than a circular migration programme. Against the background of the EU visa liberalisation with Ukraine, Poland might find itself without enough workers to fill the labour market gaps in a need of low-skilled migrants because of the new possibilities for Ukrainians to look for a job throughout the whole of the EU.

The patchy national approach to migration is further complicated by the process of Europeanisation, which continues to influence Polish migration law. Poland applies a minimum standards transposition approach. The main reason for that is rooted in the lack of a comprehensive labour migration policy and the fact that the government does not consider the need for labour migration as a pressing issue, unlike targeting foreigners from the Eastern neighbours through specific policy measures.[442] This creates possibilities to circumvent the applicable legal framework, as in the case of family reunification, or new possibilities but only under the pressure of the business to create workable solutions, such as in the case of the Blue Card Directive.

Furthermore, the started process of liberalisation of the labour migration legislation is based on exemptions from the Foreigners Act that is regulated in bylaws, which combined with the unlawful interpretation practices on local level leads to legal uncertainty for the migrant workers. This also explains why there are so many inconsistencies when it comes to other areas that are intertwined with migration policy. One sees clearly that in areas, which are in the national competence of the Member States, such as social security coordination and the recognition of qualifications, policies are still lagging behind the migration processes, as well as the needs of the labour market.

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440 Interview #4 with expert, Poland, December 2016, Annex II.
441 Interview #4 with expert, Poland, December 2016, Annex II.
442 Interview #4 with expert, Poland, December 2016, Annex II. Interview #15 with academic, Poland, December 2016, Annex II.

CHAPTER 7:

Implementation of the EU's approach to circular migration at the national level – the case of Bulgaria

7.1. Introduction

This chapter examines the implementation of the EU's approach to circular migration that is present in both Bulgarian legislation and policy, and its consequences for the rights of migrant workers that come from the Eastern Partnership neighbourhood.[1] It follows the same structure as the Polish chapter: it firstly presents the historical context and the policy and legal developments in the field of migration in Bulgaria's pre- and post-EU accession periods. It then moves on to examine the existing EU and national instruments in the policy areas that need to be addressed if policy makers wish to facilitate rights-based circular migration. Thirdly, it analyses the implementation of these instruments on the basis of empirical data that has been gathered through four focus groups with migrant workers and Blue Card holders from both Ukraine and Russia. Similar to the structure in the Polish chapter, the data from the focus groups is supplemented with data on the use of these instruments, as well as interviews that were conducted with the relevant stakeholders in order to provide a comprehensive analysis of the circular migration issues at the individual level. Finally, each of the six policy areas under consideration concludes with an assessment on the basis of the developed rights-based framework for analysis.

1 The research in this Chapter covers the period up to November 2017. There were important amendments that occurred after this period. The most important ones are mentioned in footnotes.

7.2. Historical context

Migration dynamics until 1989

The Communist rule in Bulgaria (1944-1989) essentially brought intensive migratory flows and the mobility of the Bulgarian population to an end, which were caused by the country's fluctuating borders as result of the wars in the past century, the unsuccessful governmental policies, its ethnically mixed population, as well as its status as a geographical and geopolitical cross-road.[2] This period was characterised by government regulated labour migration, political emigration and ethnic movements concerning the Bulgarian population of Turkish origin.

Labour migration was heavily controlled by the state and it was aligned with communist Bulgaria's ideology-driven foreign policy. Labour force supply was regulated only on the basis of bilateral agreements that were concluded with countries from the Warsaw Pact and the Arab world (such as Syria, Libya, Tunisia and Iraq), which had sympathies with the ruling Bulgarian Communist Party.[3] Such agreements were also concluded with the Komi Autonomous Soviet Socialist Republic, which was part of the former Soviet Union. These agreements regulated the access of Bulgarian workers to the construction and timber industries.[4]

The Communist Party's ideological approach had the effect of causing artificial labour shortages and therefore in order to cover a deficit of manual workers, bilateral agreements were also signed with Vietnam, Nicaragua and Cuba, amongst other countries.[5] On the basis of ideological connections, many African students came to Bulgaria to study in the 1950s and 1960s, and a small fraction of them subsequently settled in Bulgaria after the conclusion of their studies.[6] In addition, Bulgarian professors were sent to teach at their universities.

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2 OECD, 'Trends in International Migration. SOPEMI Annual Report 1993' Paris, (1994), p. 111.

3 Ibid., p. 112. E. Markova, 'Optimising migration effects: A perspective from Bulgaria', in Godfried Engbersen et al. (eds.), *A Continent Moving West?: EU Enlargement and Labour Migration from Central and Eastern Europe* (Amsterdam University Press 2010), p. 208.

4 OECD, 'Trends in International Migration. SOPEMI Annual Report 1993', p. 112.

5 D. Bobeva, 'Emigration from and Immigration to Bulgaria', in H. Fassmann and R. Münz (eds.), *European migration in the late twentieth century. Historical patterns, actual trends, and social implications* (Hants: Edward Elgar Publishing 1994), p. 233. OECD, 'Trends in International Migration. SOPEMI Annual Report 1993', p. 112. E. Markova and Z. Vankova, 'Bulgaria', in A. Tryandafillidou and R. Gropas (eds.), *European Migration: A Sourcebook* (Ashgate, 2014), p. 40.

6 A. Zhelyazkova, V. Grigorov, and D. Dimitrova, 'Immigrants from Near and Middle East', in A. Krasteva (ed.), *Immigration in Bulgaria* (Sofia IMIR, 2005), pp. 21-23.

Emigration in this period was primarily motivated by political or ethnic reasons. This was as a consequence of another typical feature of the communist approach to migration – the ban on the free movement of Bulgarian citizens – that was introduced through very restrictive border control and stringent criteria for the issuing of passports.[7] Between 1947 and 1987, the estimated number of asylum applications made by Bulgarian nationals totalled 14 000.[8] The largest communities of Bulgarian asylum seekers were concentrated in the neighbouring countries: Greece, Turkey, Yugoslavia, as well as in Italy and France.[9] The number of asylum seekers coming from Bulgaria continued to grow after the establishment of the Communist Party right up until the mid-1950s.[10] According to UNHCR data, Bulgarians also continued to seek asylum in the period 1981-1988, whereby 2761 applications were registered in different receiving states.[11]

Three massive waves of ethnic emigration occurred between the end of World War II and 1951.[12] Facilitated by several bilateral agreements with Turkey, the ethnic emigration of Bulgarian Turks was the most significant phenomenon in post-World War II Bulgaria. Their first mass outflow was mainly caused by the expropriation of land in Bulgaria in 1949, which was not received well by the Bulgarian Turks since the majority of them were employed as farmers.[13] Some 154 000 Bulgarian Turks migrated to Turkey throughout the period 1950-1951, and on the basis of the signed family reunification agreements, another 130 000 left Bulgaria in the period 1968-1978.[14] The second largest group involved in the post-war ethnic emigration of Jews.[15] Some 32 106 Jews left Bulgaria for Israel in the period 1948-1949, which was followed by the mass emigration of 8000 Armenians that was facilitated by the Soviet government in the period 1946-1951.[16]

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7 Markova, 'Optimising migration effects: A perspective from Bulgaria', p. 208.
8 A. Gächter, 'The Ambiguities of Emigration: Bulgaria since 1988', International Migration Papers 39, ILO Geneva, (2002), p. 23.
9 Markova, 'Optimising migration effects: A perspective from Bulgaria', p. 210.
10 Ibid.
11 Ibid.
12 Ibid., p. 208.
13 Ibid.
14 A. Zhelyazkova, 'The Social and Cultural Adaptation of Bulgarian Immigrants in Turkey', in A. Zhelyazkova (ed.), *Between Adaptation and Nostalgia: the Bulgarian Turks in Turkey* (rethrieved at: http://www.omda.bg/public/imir/studies/nostalgia_1.html, 1998). See also L. Petkova, 'The ethnic Turks in Bulgaria: Social integration and impact on Bulgarian - Turkish relations, 1947–2000', *Global Review of Ethnopolitics* 1(2002), pp. 42-59.
15 R. Guentcheva, P. Kabakchieva, and P. Kolarski, 'Volume I - Bulgaria. The social impact of seasonal migration', Migration Trends in Selected Applicant Countries (2003), p. 12.
16 For more details see , V. Mintchev, 'External Migration and External Migration Policies in Bulgaria', *South East Europe Review for Labour and Social Affairs,* 2/3 (1999).

The second wave of mass emigration between 1966 and 1980 was dominated by ethnic Turks who moved back to Turkey on the basis of concluded bilateral agreements.[17] The spring of 1989 saw another mass exodus of ethnic Turks, which was referred to by the public (somewhat ironically) as "the big excursion", which in turn marked a culmination of years of pursued assimilationist policy by the Communist Party.[18] This third wave was mainly motivated by the governmental "Bulgarisation" campaign that began in 1985, which banned ethnic Turks from wearing traditional Turkish dresses and speaking Turkish in public places, as well as forcing them to change their names to Bulgarian Slavic names.[19] Despite the resistance among the Bulgarian Turks, the Bulgarian government commenced with the expulsion of Turks in 1989, disregarding the efforts of the Turkish government to negotiate an orderly migration process. Thus, in June 1981 Turkey opened its borders to Bulgarians until August 1989, at which point Turkey reintroduced visa requirements for the ethnic Turks. Some 360 000 ethnic Turks were estimated to have left Bulgaria for Turkey in this period and more than a third returned as a result of the revocation of the bans imposed on ethnic Turks after the fall of the Communist regime at the end of 1989.[20]

Migration dynamics after 1989

The beginning of this period was characterised by the brain drain of professionals and workers of all skill levels, which was triggered by dramatically deteriorating economic conditions and political uncertainty in Bulgaria. In addition, the fall of the Communist regime on 10 November 1989 marked a change in Bulgaria's status, which from a country of major emigration started its slow transition towards a transit country and a migrant receiving state.[21] Immigrants mainly came from several CIS countries, Turkey and some Arab States and they were using Bulgaria as migratory channel to enter Western Europe, very often through irregular migration mechanisms.[22] The foreign workers that were recruited through the bilateral agreements that were signed by the Communist regime found themselves

17 Guentcheva, Kabakchieva, and Kolarski, 'Volume I - Bulgaria. The social impact of seasonal migration', p. 12.

18 Markova, 'Optimising migration effects: A perspective from Bulgaria', p. 209; Bobeva, 'Emigration from and Immigration to Bulgaria', p. 224.

19 Bobeva, 'Emigration from and Immigration to Bulgaria', p. 224; Markova, 'Optimising migration effects: A perspective from Bulgaria', p. 209.

20 Guentcheva, Kabakchieva, and Kolarski, 'Volume I - Bulgaria. The social impact of seasonal migration', p. 14. Zhelyazkova, 'The Social and Cultural Adaptation of Bulgarian Immigrants in Turkey'.

21 Bobeva, 'Emigration from and Immigration to Bulgaria', p. 231. Markova and Vankova, 'Bulgaria', p. 41.

22 Bobeva, 'Emigration from and Immigration to Bulgaria', p. 231.

"redundant" at the beginning of 1990, when it was discovered that there was no actual deficit of manual workers but rather there was hidden unemployment in other production segments.[23] In addition, a negative attitude developed towards the Vietnamese workers in Bulgaria, which led to the government's decision to expel all Vietnamese and Nicaraguan workers before the terms of the bilateral agreements expired.

At the beginning of the country's transition to democracy, the data on the number and status of immigrants were very scarce and not publicly accessible.[24] According to Ministry of Interior data that was presented in the first SOPEMI report covering Bulgaria, by the end of September 1992 there were 28 000 foreigners permanently residing in Bulgaria.[25] Most of them came from the former Soviet Union. Some 7300 foreigners were granted permanent residence status between 1 January 1990 and 31 December 1993.[26] 75% of them obtained this type of permit on the ground that they were married to a Bulgarian citizen. The overall stock of foreigners with permanent residence permits in Bulgaria totalled 32 700 persons in September 1993. [27] The temporary residence status holders who were residing longer than six months in Bulgaria amounted to 28 000, less than half of whom were students that came mainly from Greece, Russia and Syria.[28] At the beginning of the 1990s, new groups of migrants, such as those coming from China, entered the country mainly as small entrepreneurs and low-skilled employees.[29] In addition, a new wave of Vietnamese immigration picked up in the first years after the fall of the Communist regime.[30]

In the years to follow, immigration in Bulgaria continued to grow at a slow but stable pace. According to OECD data that was published in 2000, the estimated stock of foreign citizens reached 101 000 or 1.2% of the total population.[31] The number of permanent residents remained stable at around 40 000 with most of them coming from the CIS countries and entering the country as a result of mixed marriages. The long-term (continuous) permit holders, on the other hand, entered

23 Ibid., p. 233.
24 Ibid., p. 232; A. Zhelyazkova, V. Angelova, and Z. Vladimirov, 'Undocumented Worker Transitions: Bulgaria Country Report', EU Sixth Framework Programme (2007), p. 14.
25 OECD, 'Trends in International Migration. SOPEMI Annual Report 1993', p. 116.
26 OECD, 'Trends in International Migration. SOPEMI Annual Report 1994', Paris, (1995), p. 136.
27 Ibid.
28 Ibid.
29 For detailed information, see: A. Krasteva, *Immigration in Bulgaria* (Sofia IMIR, 2005).
30 Markova and Vankova, 'Bulgaria', p. 44.
31 OECD, 'Trends in International Migration: SOPEMI 2009 Edition', (2010), p. 150.

the country primarily as self-employed entrepreneurs.[32] 25 % of them were EU citizens, followed by CIS nationals (14%) and citizens of neighbouring countries. Labour immigration did not pick up in this period due to the adverse situation of the labour market that was present since the 1990s and which was characterised by high unemployment rates, as well as the establishment of restrictive legislation regulating the access to the labour market for foreign workers.[33] Between 1994 and 2002, only 2234 work permits were issued.[34] Therefore, labour migration was predominantly characterised by highly-skilled professionals who had facilitated access to the labour market – such as senior business management, teachers and consultants – and who mainly came from the United States, Turkey, Ukraine, the Russian Federation and Greece.[35]

In the first years of the new millennium, the Bulgarian economy began to stabilise and show signs of economic growth, which led to a workforce shortage in 2007 and 2008 for the first time in the history of democratic Bulgaria.[36] The economic growth and attractiveness of Bulgaria as an EU Member State lead to an increase in student immigration and EU citizens exercising their free movement rights.[37] Labour immigration of third-country nationals also reached a peak of almost 1900 work permits in 2008.[38] The onset of the global economic crisis, however, brought an end to these shortages in the workforce, thereby bringing the labour market situation back to the dynamics that were present in the pre-accession period.[39] This also led to a steady decline in the number of immigrants entering Bulgaria.[40]

The fall of the Communist regime meant that Bulgarian citizens were once again granted the freedom to travel. The year 1989 marked the last big wave of emigration in the post-communist period; an estimated at 218 000 Bulgarians left the country, mainly for Turkey.[41] The emigration wave that followed in 1990 was

32 Ibid., p. 151.
33 Ibid.
34 OECD, 'Trends in International Migration: SOPEMI 2004 Edition', (2005), p. 166.
35 Markova and Vankova, 'Bulgaria', p. 44; OECD, 'Trends in International Migration: SOPEMI 2004 Edition', p. 168.
36 Open Society Institute Sofia, 'Current Trends in Cross-border Workforce Migration, in Labour Migration Trends and the free movement of people – the effects for Bulgaria', (2011), p. 47; OECD, 'Trends in International Migration: SOPEMI 2009 Edition', p. 194. Markova and Vankova, 'Bulgaria', p. 41.
37 OECD, 'Trends in International Migration: SOPEMI 2009 Edition', p. 194.
38 Open Society Institute Sofia, 'Current Trends in Cross-border Workforce Migration, in Labour Migration Trends and the free movement of people – the effects for Bulgaria', p. 47.
39 Ibid.
40 Markova and Vankova, 'Bulgaria', p. 40.
41 Markova, 'Optimising migration effects: A perspective from Bulgaria', p. 212.

caused by two main factors.[42] Firstly, it was driven by the disappointment of many Bulgarians who saw the renamed ex-Communist party win the first democratic elections with a solid parliamentary majority. Secondly, deteriorating economic conditions and rising unemployment in Bulgaria meant that people were genuinely concerned about their physical survival.[43]

Germany attracted the largest proportion of emigrants in this wave (around 13 000),[44] most of whom sought asylum there since this was the only legal channel for migration that they were aware of.[45] During this period, seasonal migration to Greece gained significance. According to unofficial data, 33 000 Bulgarians migrated to Greece as seasonal workers.[46] This migration was characterised to a certain extent by "brain drain" because more than half of the Bulgarians that left had secondary school or higher education qualifications. The main motivation for the highly-qualified Bulgarians was to escape growing unemployment and to find new opportunities in order to exercise their professions. [47]

1993 saw Bulgaria being placed on the EU visa "negative list", which impacted the character and intensity of migration flows to Western Europe. Migration to Greece and Italy became mainly irregular in nature and regular migration to Western Europe fell dramatically with the exception of migration flows to Germany and Austria.[48]

In the following years, the economic conditions in Bulgaria continued to deteriorate, which served as a push factor for the migration of many highly-skilled Bulgarians. Furthermore, the economic decline impacted the ethnically mixed regions, where tobacco growing and construction were the main livelihoods. As a result of being left without subsidies and other state aid to grow tobacco, many of the ethnic Turks that were inhabiting these regions migrated back to Turkey, which depopulated some of the municipalities in Southern Bulgaria.[49] The culmination of the economic crisis was marked in 1997,[50] which triggered the phenomenon

42 Bobeva, 'Emigration from and Immigration to Bulgaria', p. 229.
43 R. Hutchings, 'Bulgaria: The economy', *Eastern Europe and the Commonwealth of Independent States* (London: Europa Publications Ltd, 1994).
44 Markova, 'Optimising migration effects: A perspective from Bulgaria', p. 212.
45 Bobeva, 'Emigration from and Immigration to Bulgaria', p. 229.
46 OECD, 'Trends in International Migration. SOPEMI Annual Report 1993', p. 115.
47 Markova, 'Optimising migration effects: A perspective from Bulgaria', p. 212.
48 Ibid.
49 OECD, 'Trends in International Migration. SOPEMI Annual Report 1994', p. 134.
50 This led to the imposition of the Monetary Board by the International Monetary Fund to rein in the hyper-inflation that was present at that time.

known as "survival" migration, mainly to the Czech Republic, Hungary and Romania on the basis of the facilitation provided through the Central European Free Trade Area.[51] In the second half of the 1990s, Spain and the UK also started to attract Bulgarian emigrants.

After 2001, the emigration of Bulgarians was mainly carried out for the purposes of education and seasonal work, which intensified after Bulgaria was removed from the EU's "negative list".[52] As a result of that event, many Bulgarians carried out irregular employment while legally travelling within the Schengen zone. This trend continued after Bulgaria's accession to the EU, due to the transitional periods that were imposed by many Member States in relation to the employment of Bulgarian workers. The increased unemployment in certain regions in Bulgaria gave rise to semi-legal temporary and circular migration, which was ethnically and regionally specific. [53] After Bulgaria's accession to the EU in 2007, Bulgarians continued to leave the country as a result of low living standards, lack of professional realisation and low-quality education [54] which were caused by, amongst other things, the failed transition to a market economy, regional disparities and imbalanced investments, failure to combat corruption and persistent political instability.[55]

7.3. Migration legal and policy framework[56]

7.3.1. Pre-accession period: 1989 - 2007

As in the case of Poland, two events "have deeply shaken established efforts towards near-total migration restriction" in Bulgaria: the onset of the transition to democracy after 1989 and its accession to the EU in 2007.[57] Before Bulgaria's

51 OECD, 'Trends in International Migration. SOPEMI Annual Report 1999', Paris, (1999), p. 114.

52 See for instance, E. Markova, 'Bulgarian Migrants: Statistical and Demographic Profile', in K. Stanchev (ed.), *Bulgarian Migration: Incentives and Constellations* (Open Society Institute Sofia 2005), pp. 7-40.

53 Markova, 'Optimising migration effects: A perspective from Bulgaria', p. 214.

54 Ibid.

55 For latest emigration data, see G. Angelov and M. Lessenski, '10 Years in EU. Migration Trends in Bulgaria', Sofia (2017).

56 Parts of this sections were published in Z. Vankova, 'Implementing the EU's Circular Migration Approach: Legal and Migrant Perspectives on Entry and Re-Entry Conditions in Bulgaria and Poland', *Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2017/34,* (2017).

57 D. Daskalova and T. Lewis, 'Legal Dimensions of Immigrant Access to Employment in Bulgaria: Contextual Analysis', in Y. Georgiev (ed.), *The Implication of EU Membership on Immigration Trends and Immigrant Integration Policies for the Bulgarian Labor Market* (Sofia Economic Policy Institute, 2008), p. 80.

EU accession process commenced, asylum and migration policies were largely neglected.[58] Therefore, the Europeanisation process that started after 1989 filled the "institutional lacunae" that were left by the communist legacy.[59] Since the early 1990s, the legislation in the field of migration was and continues to be the subject of continuous amendments and adjustments.[60]

In the first years of Bulgaria's transition to democracy, its efforts in relation to migration were targeted at adherence to the UDHR, establishing the freedom of movement for Bulgarian citizens as well as for foreigners, the introduction of visa-free travel regimes with many countries and the ratification of international instruments in the field of asylum and refugees. However, Bulgaria did not accede to the ILO Migration and Employment Convention (No. 97), ILO Migrant Workers Convention (No. 143) and the ICRMW or the European Convention of the Legal Status of Migrant Workers.[61]

1991 saw the adoption of the Constitution of the Republic of Bulgaria,[62] which provided certain norms pertaining to the rights and obligations of foreigners. Article 26 (2) of the Constitution introduced the principle that foreigners residing on the Republic of Bulgaria are vested with all rights and obligations proceeding form the Constitution, except those for which Bulgarian citizenship is required. The right to free movement on the territory of the country and to leave the country (Article 35 (1)), the right to asylum and refugee status (Articles 27 (2) and (3)), protection, by law, of investments and business activities of Bulgarian and foreign citizens and legal entities (Article 19 (3)) were also enshrined in the Bulgarian Constitution.

The new Constitution also introduced the basic provisions for the adoption of a new basic Act on Citizenship.[63] In order to avoid a repetition of the repressive practices that were present during the communist past, the Constitution prohibited depriving Bulgarian citizens by birth of their citizenship (Article 25 (3)) and a

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58 See for instance, European Parliament, 'Bulgaria', (1999).

59 H. Grabbe, *The EU's Transformative Power. Europeanization Through Conditionality in Central and Eastern Europe* (Palgrave Studies in European Union Politics: Palgrave Macmillan 2006), p. 167.

60 Daskalova and Lewis, 'Legal Dimensions of Immigrant Access to Employment in Bulgaria: Contextual Analysis', p. 81.

61 For the full list of the international instruments that Bulgaria has ratified, see the footnotes on the ratifications in sections 3.2. and 3.3 of Chapter 3.

62 Конституция на Република България, promulgated in State Gazette (SG) No. 56/13 July 1991, in force from 13 July 1991, last amendment SG No.100/18 December 2015.

63 D. Smilov and E. Jileva, 'The politics of Bulgarian citizenship: National identity, democracy, and other uses', in R. Baubock, B. Perchinig, and W. Sievers (eds.), *Citizenship Policies in the New Europe* (Amsterdam University Press 2009), p. 220.

prohibition against the extradition and expatriation of Bulgarian citizens (Article 25 (4)). It also made certain concessions to ethnic Bulgarians by introducing a facilitated naturalisation procedure for persons of Bulgarian origin (Article 25 (3)).[64] As a result of the expulsions of the Bulgarian Turks in the 1980s, many of them gained Turkish citizenship and thus possessed dual citizenship. The 1991 Constitution "altered this practice, mostly by remaining silent on the possibility of double citizenship".[65]

At the advent of democracy, Bulgaria's main piece of migration legislation was the Act on the Residence of Foreigners in Bulgaria (ARFB) that was adopted in 1972.[66] It was created, however, during a period which did not match the new reality after the fall of the Iron Curtain. It had a liberal regulation for entry into the country, without the need for a visa, for almost all potential sending countries such as the former Soviet Union republics and former Yugoslavia.[67] Foreigners, who wished to enter as tourists, only had to present a voucher for a hotel or proof of other accommodation suitable for an overnight stay.[68] The Act recognised only two categories of foreigners: permanent and temporary residents.[69] Temporary residence could last up to five years and it did not require any visa or work permits, since there were no labour market access restrictions for foreigners (Article 9 ARFB).[70]

The access of foreigners to the labour market was also facilitated by the Act on Economic Activity of Foreign Persons and an Act on the Encouragement and Protection of Foreign Investments that were both adopted in 1992 (Articles 2, 3 and 4).[71] It stipulated that foreigners were able to engage in economic activities and have the same rights and obligations as Bulgarian citizens, as long as Bulgarian law did not indicate otherwise.[72]

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64 Ibid.

65 Ibid., p. 221.

66 Закон за пребиваване на чужденците в Народна република България, SG No. 93/28 November 1972, repealed SG No.153/23 December 1998. In OECD, 'Trends in International Migration. SOPEMI Annual Report 1993', p. 118.

67 Bobeva, 'Emigration from and Immigration to Bulgaria', p. 232; Guentcheva, Kabakchieva, and Kolarski, 'Volume I - Bulgaria. The social impact of seasonal migration', p. 58.

68 Bobeva, 'Emigration from and Immigration to Bulgaria', p. 232.

69 OECD, 'Trends in International Migration. SOPEMI Annual Report 1993', p. 118.

70 Bobeva, 'Emigration from and Immigration to Bulgaria', p. 232.

71 Закон за насърчаване и закрила на чуждестранните инвестиции, SG No. 8/ 28 January 1992, repealed SG No. 97/24 October 1997. In Bobeva, 'Emigration from and Immigration to Bulgaria', p. 232.

72 Bobeva, 'Emigration from and Immigration to Bulgaria', p. 232.

The increased flow of transit and irregular migration led to the introduction of the first set of legal restrictions in 1993.[73] As in the case of Poland, the Bulgarian government feared that, as a result of the new Act on the Freedom to Travel in Russia and other CIS countries, Bulgaria would experience a wave of immigration and therefore some restrictions were needed so as to limit this potential inflow of Russians transiting through Bulgaria on their way to Western Europe. Since 1992, visa-free entry was only available for the nationals of 35 (mainly developed) countries, who had paid for tourist services in Bulgaria in advance.[74] Visas were required for nationals of the other CEE countries, some Asian and African countries, as well as for nationals of the United States. In 1993, the government introduced new visa requirements for the nationals of 79 African and Asian countries, including nationals of the former Soviet republics.[75]

Furthermore, labour migration was emerging as new problem at this time.[76] The growing number of foreigners entering the country at a time when the unemployment rate was skyrocketing (reaching 14% of the active population by the end of 1992) made the labour market sensitive to any unwanted foreign labour supply and served as another reason for introducing further restrictions.[77]

In 1994, the Ministry of Labour and Social Welfare introduced a work permit requirement for foreigners' access to the labour market on the basis of the adopted Regulation on the Terms and Procedures for Work Permit Issuing to Foreign Nationals in the Republic of Bulgaria.[78] However, very few permits were issued in the years that followed. Between September 1994 and October 1996, the number of issued permits amounted to 600.[79] They were issued only to highly-skilled foreign workers, such as engineers, senior managers and consultants. The reason for the number of the issued permits was due to the fact that there was no clear distinction between the cases that had to be covered by work permits as opposed to business visit permits, as well as the lack of enforcement by the state authorities.[80] In addition, the issuing of business visit permits was simplified and this was

73 Ibid.
74 OECD, 'Trends in International Migration. SOPEMI Annual Report 1994', p. 135.
75 Ibid., p. 136.
76 Bobeva, 'Emigration from and Immigration to Bulgaria', p. 232.
77 Ibid.
78 Наредба за реда и условията за издаване на разрешения за работа на чужденци в Република България, adopted by the Council of Ministers Decree No 267/30 December 1992, SG No. 4/15 January 1993, repealed SG No. 39/16.04.2002. In Guentcheva, Kabakchieva, and Kolarski, 'Volume I - Bulgaria. The social impact of seasonal migration', p. 67; p. 69.
79 OECD, 'Trends in International Migration. SOPEMI Annual Report 1996', Paris, (1997), p. 82.
80 Bobeva, 'Emigration from and Immigration to Bulgaria', pp. 232-233.

preferred over obtaining a work permit, because it was not subject to any labour market access restrictions.

The high rate of unemployment and the growing number of transit migrants led to new amendments to the Regulation in 1996, which added new requirements for obtaining a work permit: the foreigner had to have special skills, professional experience and a specific educational background.[81] In addition, their employment contracts had to be for a full-time basis and Bulgarian employers were obliged to try and recruit Bulgarian workers before hiring foreign workers.[82]

The bilateral agreements for the exchange of labour remained the main policy instrument for the management of labour migration after the fall of the Communist regime. The signing of such agreements was considered to be the only way to resolve the labour market problems, to regulate labour migration and at the same time to limit discrimination against Bulgarian workers in foreign labour markets.[83] In the first half of the 1990s, Bulgaria concluded three bilateral agreements - two with Germany and one with Switzerland[84] - through which some 20 000 Bulgarians found work abroad.[85] At the dawn of its accession to the EU, Bulgaria had signed bilateral agreements with almost all EU Member States and candidate countries in the CEE area.[86] It had also signed agreements with Serbia and Montenegro, Ukraine, Georgia, Albania and Croatia and several other agreements were in the process of being negotiated.

The fall of the Communist regime also required changes to the Bulgarian citizenship legislation and the establishment of a new policy towards Bulgarians abroad. After the transition to democracy started, the 1968 Citizenship Act[87] was amended so as to repeal "the most repressive parts of the communist legacy" and it provided for a facilitated naturalisation procedure for persons of Bulgarian origin in line

81 OECD, 'Trends in International Migration. SOPEMI Annual Report 1996', p. 82.
82 Ibid.
83 OECD, 'Trends in International Migration. SOPEMI Annual Report 1993', p. 117.
84 Intergovernmental agreement with the Federal Republic of Germany concerning workers from Bulgaria for the implementation of employment contracts, signed on 13 March 1991; Intergovernmental agreement with the Federal Republic of Germany concerning employment of workers for enhancement of their professional and linguistic knowledge, signed on 04 February 1992; Agreement between the government of the Republic of Bulgaria and the government of the Swiss Confederation for exchange of trainees, signed on 05 April 1995.
85 Guentcheva, Kabakchieva, and Kolarski, 'Volume I - Bulgaria. The social impact of seasonal migration', p. 72.
86 OECD, 'Trends in International Migration: SOPEMI 2004 Edition', p. 169.
87 Закон за българското гражданство, SG No. 79/11 October 1968, repealed SG No. 136/18 November 1998.

with the notion of "a person of Bulgarian origin" that was introduced in the 1991 Constitution.[88] The first Act on Bulgarian Citizenship in democratic Bulgaria was adopted in 1998,[89] and it defined that "a person of Bulgarian origin is one whose ascendants (or at least one of these) are Bulgarian" (Para. 2 (1)).[90] "Bulgarian" in this definition did not necessarily mean a Bulgarian citizen, but rather a person whose origin was of Bulgarian "blood".[91] Thus, this notion referred to an ethnic identity and not to a special legal status and therefore the establishment of what constituted Bulgarian origin was ethnic-based.[92]

Persons could establish their ethnic Bulgarian origin, *inter alia*, on the basis of the birth certificates of their parents and grandparents, their mother tongue, membership of a Bulgarian Church, school or the former Bulgarian citizenship of their parents.[93] According to Article 15 of the current Act on Bulgarian Citizenship, persons of Bulgarian origin are exempted from the majority of obligations that one needs to meet under the general naturalisation regime: they need to have reached the age of majority and they must not have been sentenced by a Bulgarian court for a premeditated crime of a general nature or subject to criminal proceedings for such a crime unless the person concerned has been rehabilitated (Article 15, Para 1 (1)).[94]

Another important policy development that is closely intertwined with the Bulgarian citizenship legislation was the establishment of the Agency for Bulgarians Abroad in 1992. This was set up as the institution responsible for the implementation of the special policy on overseas Bulgarians.[95] The agency's aim was to establish and maintain contacts with associations, societies, churches and schools in Bulgarian communities abroad and to support their activities in order to preserve

88 Todorov (1996) quoted in Smilov and Jileva, 'The politics of Bulgarian citizneship: National identity, democracy, and other uses', p. 223.

89 Закон за българското гражданство, SG No. 136/18 November 1998, in force from 20 February 1999, last amendment SG No. 103/27 December 2016.

90 Smilov and Jileva, 'The politics of Bulgarian citizenship: National identity, democracy, and other uses', p. 223.

91 Ibid.

92 Ibid., p. 225.

93 Ibid.

94 For a consice summary of the general naturalisation regime in Bulgaria, see V. Ilareva, 'Migration, Asylum and Citizenship Policies in Bulgaria', *Paper presented at a Workshop on citizenship, kin-state policy and migration, organized by the Balassi Insti- tute of Bucharest and the Romanian Institute of Research on National Minorities, in Bucharest on 20 and 21 May 2015* (2015), pp. 76-77.

95 OECD, 'Trends in International Migration. SOPEMI Annual Report 1993', p. 117; p. 118. The Agency was established by Council of Ministers Decree No 180/1 October 1992. It was granted the status of a State Agency – a body of the Council of Ministers – by Council of Ministers Decree No 19/21 February 2000.

the Bulgarian language, cultural and religious traditions. The agency formed an important part of the facilitated procedure for certifying Bulgarian origin for those persons applying for naturalisation and long-term residence permits.[96]

In line with this policy on Bulgarians abroad, at the beginning of 1990s, the newly elected President and Vice President visited countries where Bulgarian communities lived - such as Moldova and Ukraine - in order to sign agreements with these countries to assist these communities in the educational and cultural sphere.[97] The year 2000 saw the adoption of the Act on Bulgarians Living outside the Republic of Bulgaria,[98] defining these Bulgarians as persons permanently residing abroad who have at least one parent of Bulgarian origin and have a Bulgarian national consciousness (Article 2). The Act also provided more concrete conditions for the establishment of Bulgarian origin, such as documents issued by a Bulgarian or foreign state institution, an organisation of Bulgarians living outside Bulgaria approved by the authorised state institution or by the Bulgarian Orthodox Church (Article 3). It stipulated the rights of Bulgarians living abroad, among which were the right to permanent residence (Article 15 (1)), as well as facilitated access to the Bulgarian labour market (Article 7).

As Smilov and Jileva stress, however, the Act focused mainly on historical Bulgarian minorities in neighbouring countries rather than Bulgarian emigrants who left for political or economic reasons.[99] In line with this policy, the government attempted to attract ethnic Bulgarians from Moldova and Ukraine to settle in the depopulated and ethnically mixed regions in Bulgaria in order to compensate the waning workforce.[100] Nevertheless, this "unwritten policy" measure did not have a great impact since the returning ethnic Bulgarians wanted to settle in the cities and towns, while the State Agency for Bulgarians Abroad (SABA) tried to direct them to the deserted agriculture areas.[101]

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96 Smilov and Jileva, 'The politics of Bulgarian citizenship: National identity, democracy, and other uses', p. 233.

97 OECD, 'Trends in International Migration. SOPEMI Annual Report 1993', p. 117. In 1993, the Council of Minsiters adopted a Decree for the implementation of educational activities among the Bulgarians abroad and 1997 saw the adoption of Council of Minsiter Decree 228/20 May 1997 for admission of FYROM citizens as students in the higher education institutions in Bulgaria, providing scholarships to students from FYROM.

98 Закон за българите, живеещи извън Република България, SG No. 30/11 April 2000, last amendment SG No. 58/26 July 2016.

99 Smilov and Jileva, 'The politics of Bulgarian citizenship: National identity, democracy, and other uses', p. 234.

100 Guentcheva, Kabakchieva, and Kolarski, 'Volume I - Bulgaria. The social impact of seasonal migration', p. 53.

101 Ibid.

In 1992, the Bureau of the UNHCR and the National Bureau on the Territorial Asylum of Refugees of the Council of Ministers were respectively established.[102] In 1994, the Regulation for Granting Refugee Status was adopted,[103] which provided for an asylum procedure and conditions for granting refugee status in line with the Geneva Convention, which was ratified by Bulgaria in 1991.[104] 1998 saw the adoption of the Refugee Act,[105] stipulating the establishment of a Refugee Agency and the establishment of a procedure for examining asylum applications and granting refugee status.[106] In order to ensure the implementation of the relevant European legal instruments into Bulgarian legislation, a new Act on Asylum and Refugees was adopted in 2002.[107]

The Bulgarian government submitted its application for EU membership in December 1995 and following the Helsinki European Council's decision in December 1999, accession negotiations were initiated in February 2000.[108] The country advanced with the requisite reforms, mainly when it felt "the stick of EU conditionality".[109] Every time the EU penalised Bulgaria, it would rapidly respond with revised reform strategies and make pledges for additional measures.[110]

Bulgaria, which was subject to the EU's restrictive policies since 1993 when it was placed on the EU's negative list, had to introduce similarly restrictive policies for other countries.[111] The country adopted a "catch-up and imitation" approach in the context of the initiated Europeanisation process.[112] The main driving force behind this strategy was entrenched in the desire to leave the EU's negative visa list and

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102 OECD, 'Trends in International Migration. SOPEMI Annual Report 1993', p. 118.

103 Наредба за предоставяне и регламентиране статута на бежанците, adopted with a Council of Ministers Decree No 208/1994, SG No. 84/ 14 October 1994, repealed SG No. 40/16 May 2000.

104 OECD, 'Trends in International Migration. SOPEMI Annual Report 1994', p. 137; Bobeva, 'Emigration from and Immigration to Bulgaria', p. 234.

105 Закон за бежанците, SG No. 53/11.06.1999, repealed SG No. 54/31.05. 2002.

106 OECD, 'Trends in International Migration. SOPEMI Annual Report 1999', p. 116.

107 Закон за убежището и бежанците, SG No. 54/ 31.05.2002, in force from 1.12.2002, last amendmend SG No. 103/ 27 December 2016. See European Migration Network and Ministry of Interior of Republic of Bulgaria, 'The Practices in the Republic of Bulgaria Concerning the Granting of Non-EU Harmonised Protection Statuses', (2010), p. 7.

108 For a summary of the accession process, see G. Noutcheva and D. Bechev, 'The Successful Laggards: Bulgaria and Romania's Accession to the EU', *East European Politics and Societies,* 22/1 (2008).

109 Ibid., p. 124.

110 Ibid.

111 E. Jileva, 'Larger Than the European Union: The Emerging EU Migration Regime and Enlargement', in S. Lavenex and E. M. Uçarer (eds.), *Migration and the Externalities of European Integration* (Lanham, MD: Lexington Books, 2002), p. 81.

112 Grabbe, *The EU's Transformative Power. Europeanization Through Conditionality in Central and Eastern Europe*, p. 111.

show its EU partners that it could be fully trusted to implement the *acquis*.[113] After the decision to lift the visa requirements for Bulgarians was made in 2000, the country started a procedure to terminate the existing bilateral visa-free agreements with Georgia, Russia, Ukraine and Tunisia in order to ensure full compliance with the EU's negative list.[114] Bulgaria introduced a visa regime for Ukraine faster than Poland did, even though it was further away from an accession date at that time.[115] With regards to Russia, Bulgaria delayed the introduction of visas due to the special relations between the two countries.[116] It sent a readmission agreement to Russia in an attempt to circumvent the visa problem, but since it did not have an agreement of this kind with any other country, the attempt failed and Bulgaria subsequently introduced visas for Russia citizens, again years ahead of Poland.[117] The economic effects of this decision were significant, especially with regard to trade with Russia, as well as tourism, which was very popular among the Russians and Ukrainians.

Bulgaria did not react as promptly as Poland to the introduced barriers by the adoption of the Schengen *acquis*. It postponed the introduction of visas only to its closest neighbours until its accession.[118] Bulgaria concluded bilateral intergovernmental agreements with Macedonia and Serbia regarding the mutual travel of their citizens, which permitted the issuance of visas for the citizens of those countries at the border for a stay of up to ten days.[119] These agreements also provided for rules stipulating the facilitation of short-stay visas as well as the travel of citizens of Macedonia and Serbia to Bulgaria respectively. In addition, two more Bulgarian consulates were opened in Bitola (Macedonia) and Nis (Serbia).

113 Ibid., p. 175; A. Gros-Tchorbadjiyska, 'The Europeanization of Visa Policy: A Transfer of Sovereignty Shaped by enlargement', (Katholieke Universiteit Leuven 2010), p. 421.
114 Guentcheva, Kabakchieva, and Kolarski, 'Volume I - Bulgaria. The social impact of seasonal migration', p. 65.
115 Grabbe, *The EU's Transformative Power. Europeanization Through Conditionality in Central and Eastern Europe*, p. 175.
116 Gros-Tchorbadjiyska, 'The Europeanization of Visa Policy: A Transfer of Sovereignty Shaped by enlargement', p. 255.
117 Jileva, 'Larger Than the European Union: The Emerging EU Migration Regime and Enlargement', p. 82.
118 Gros-Tchorbadjiyska, 'The Europeanization of Visa Policy: A Transfer of Sovereignty Shaped by enlargement', p. 269.
119 Ibid., p. 267.

The current Act on Foreigners was adopted in 1998[120] in order to repeal the 1973 Act on the Residence of Foreigners, [121] which dated back to the Communist regime and to establish a system compatible with the EU requirements with a view to Bulgaria's future accession to the EU.[122] The Act brought the Bulgarian regime in full compliance with the classification of the types of visas contained in the Schengen Agreement.[123] The Foreigners Act also envisaged the legal possibility for family reunification in line with the European Commission's recommendations.[124] It provided for permits linked to a short-term residence stays (up to 90 days) and long-term residence stays: continuous permits issued for a stay of up to 12 months and permanent permits with an unlimited term.[125] The two types of permits were granted on very specific grounds, *inter alia*, the possession of a work permit, management of an enterprise, pursuit of studies or health reasons. The Act also provided concrete criteria for refusing to extend a residence permit.

The year 2000 saw the adoption of the Implementation Regulation of the Foreigners Act,[126] which introduced additional restrictions. Amongst other things, it limited the possibility for the use of "engagement in entrepreneurial activities" as a ground for immigration.[127] According to OECD reports, this ground had been abused under the previous legislation. Therefore, according to the new regulation, foreigners were required, along with registering their company as a commercial entity, to also obtain a statement from the tax authorities providing evidence of satisfactory revenues and paid taxes.[128] Visa extensions became subject to very strict criteria and procedures and permits were granted only by the head of police in the relevant Regional Directorate.[129]

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120 Закон за чужденците в Република България, SG No. 153/23 December 1998, last amendment SG No. 97/5 December 2017.

121 Закон за пребиваване на чужденците в Република България, SG No.93/ 28 November 1972, repealed SG No. 153/23 December 1998.

122 OECD, 'Trends in International Migration. SOPEMI Annual Report 1999', p. 116. Guentcheva, Kabakchieva, and Kolarski, 'Volume I - Bulgaria. The social impact of seasonal migration', p. 61.

123 Guentcheva, Kabakchieva, and Kolarski, 'Volume I - Bulgaria. The social impact of seasonal migration', p. 61.

124 Ibid., p. 62.

125 OECD, 'Trends in International Migration. SOPEMI Annual Report 1999', p. 117; Guentcheva, Kabakchieva, and Kolarski, 'Volume I - Bulgaria. The social impact of seasonal migration', p. 63.

126 Правилник за прилагане на Закона за чужденците в Република България, adopted with a Council of Ministers Decree No. 87/19 May 2000, SG No. 43/26 May 2000, repealed SG No. 51/ 5 July 2011.

127 OECD, 'Trends in International Migration. Annual Report 2000', Paris: OECD, (2001), p. 142.

128 Ibid. Article 15 of the Implementing Regulation of the Foreigners Act, adopted by Council of Minsiter Decree No 87/2000, SG No. 43/2000.

129 OECD, 'Trends in International Migration: SOPEMI 2002 Edition', (2003), p. 152.

A new Act on Employment Promotion was adopted in 2001, which further restricted access to the labour market for immigrants and it was designed to strengthen control in this area.[130] These amendments aimed to link the issuance of work permits to the situation in the labour market. A new requirement was introduced providing that a Bulgarian employer was allowed to employ foreigners, so long as this did not exceed 10% of his total workforce.

A new Regulation on the terms and conditions for issuing, denying and withdrawing foreign nationals' work permits in the Republic of Bulgaria was adopted in 2002. [131] It laid out in detail the nature of the work permit application process and the labour market test, and it brought Bulgarian legislation in conformity with Council Resolution of 20 June 1994 on limitations on admission of third-country nationals to the territory of the Member States for employment.[132] It further facilitated access to the Bulgarian labour market for highly-skilled workers and managers on the basis of a fast-track work permit application procedure for, *inter alia*, foreigners whose employment was based on a bilateral recruitment agreement, scientists and managers of investment firms established in Bulgaria.[133] Furthermore, and in line with the forthcoming accession of Bulgaria to the EU, more liberal provisions for access to the labour market for EU nationals were introduced.

7.3.2. Post accession developments

Bulgaria joined the EU in January 2007 on the condition that it would continue to exhibit progress in the areas of judicial reform, the fight against organised crime and corruption under the Cooperation and Verification Mechanism - a bespoke instrument set up by the European Commission for Bulgaria and Romania.[134] After the country's accession to the EU, Bulgaria's reform drive slowed down, which led to recurrent criticism of Bulgaria's performance by the European Commission

130 Закон за насърчаване на заетостта, SG. No.112/ 29 December 2001, in force from 1 January 2002, last amendment SG No. 103/28 December 2017.

131 Наредба за условията и реда за издаване, отказ и отнемане на разрешения за работа на чужденци в Република България, adopted by Coincil of Minsiters Decree No. 77/ 9 April 2002, SG 39/16 April 2002, repealed SG No.79/7 October 2016.

132 Guentcheva, Kabakchieva, and Kolarski, 'Volume I - Bulgaria. The social impact of seasonal migration', p. 69.

133 Article 6 (2) of the Regulation. OECD, 'Trends in International Migration: SOPEMI 2004 Edition', p. 168.

134 European Commission, Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime, 2006/929/EC, OJ L 354.

and the suspension of 500 million EUR in subsidies in 2008.[135] The failure to show substantive progress in the fight against crime, high-level corruption and the lack of effective rule of law is the main reason why, ten years after Bulgaria's accession to the EU, it has not been able to join the Schengen Area despite the fact that it has fulfilled the technical criteria for accession in line with Article 4 of the Protocol Concerning the Conditions and Arrangements for Admission of the Republic of Bulgaria and Romania to the EU.[136] Additional factors in this regard pertain to the on-going "refugee crisis" and concerns as to whether Bulgaria is able to provide effective border control at the EU's external borders.[137]

Even though due to the conditionality pressure the foundations for the development of migration policy were laid, it was established as a national public policy on strategic level just after the accession of Bulgaria to the EU.[138] Bulgaria developed four national migration strategies after 2007. The National Strategy on Migration and Integration (2008-2015)[139] claimed to set the grounds for the development of a consistent national policy on managing migration and integration. In fact, one of the main reasons for the creation of a strategy in this field was a result of the establishment of a general programme on "Solidarity and Management of Migration Flows" and the funds that were available to all EU Member States for the purposes thereof.[140] The second strategy in this field, the National Strategy in the Field of Migration, Asylum and Integration (2011-2020),[141] was developed as part of the efforts of the Bulgarian government to meet the requirements for accession to

135 I. Ivanova, 'Subsection B.6: Justice and Home Affairs', in A. Kavrakova and E. Markova (eds.), *The Unfinished Business of the Fifth Enlargement Countries. Country Report Bulgaria* (Open Society Institute Sofia 2009), p. 50.

136 See Council of the European Union, Schengen evaluation of BULGARIA - Council conclusions on completion of the process of evaluation of the state of preparedness of Bulgaria to implement all provisions of the Schengen acquis, 9167/4/11 REV 4, Brussels, 24 June 2011.

137 See for instance, The Sofia Globe, 'Schengen Area: Nobody but Juncker wants Bulgaria or Romania', retrieved at: http://sofiaglobe.com/2017/09/18/schengen-area-nobody-but-juncker-wants-bulgaria-or-romania/ (accessed 24 November 2017).

138 A. Krasteva, I. Otova, and E. Staykova, 'Labor Migration in Bulgaria 2004-2009', European migration network report, (2011), p. 11; Z. Vankova, 'Subsection B.7: Migration', in A. Kavrakova and E. Markova (eds.), *The Unfinished Business of the Fifth Enlargement Countries. Country Report Bulgaria* (Open Society Institute Sofia 2009), p. 56.

139 Национална стратегия на Република България по миграция и интеграция 2008 -2015 г., adopted with Council of Ministers Decree No 22.21/05 June 2008.

140 G. Angelov, Z. Vankova, and I. Ivanova, 'Conclusions and Recommendations', in I. Ivanova (ed.), *Current Trends in Cross-border Workforce Migration, in Labour Migration Trends and the free movement of people – the effects for Bulgaria* (Open Society Institute Sofia, 2011).

141 Национална стратегия в областта на миграцията, убежището и интеграцията (2011-2020 г.), adopted with Council of Ministers Decree No. 8.17/23 February 2011.

the Schengen Area.[142] In 2014 and 2015, another two strategies were developed, mainly as a response to the refugee crisis in light of the Syrian conflict.[143]

The first 2008 Strategy stated that the Bulgarian immigration policy needed to support the economic development of the country and that its national interest required active efforts to (primarily) attract foreign citizens of Bulgarian origin.[144] According to the strategic document, communities of persons with Bulgarian ethnic origin were found, *inter alia*, in the Czech Republic, Slovakia, Romania, Hungary, Serbia, Moldova, Ukraine and Croatia - where they gained status of national minorities.[145] The biggest Bulgarian community in the Balkans region was located in Macedonia. [146] The Strategy stressed that these were foreigners "who would have fitted without any difficulties in the Bulgarian society due to their knowledge of the Bulgarian language, customs, and culture".[147]

The 2008 Strategy pursued two strategic goals: to attract Bulgarian citizens and foreign nationals of Bulgarian origin to return and settle permanently in Bulgaria;[148] and to develop and implement a modern policy on accepting third-country nationals with a view to supporting the Bulgarian economy and regulating and controlling migration processes.[149] The main policy instrument that was envisaged to attract foreign nationals of Bulgarian origin to settle permanently in Bulgaria was the "Green Card", planned as a mechanism that would grant foreign nationals of Bulgarian origin equal rights to those enjoyed by Bulgarian citizens.[150] This instrument was supposed to serve as a prerequisite for

142 Markova and Vankova, 'Bulgaria', p. 42.

143 These strategies fall outside the scope of this study. For more information see, Z. Vankova, Monitoring Report on the Integration of Beneficiaries of International Protection in Bulgaria in 2014, available at: http://multikulti.bg/wp-content/uploads/2013/06/monitoring_integration-refugees_2014-EN.pdf. For the latest developments, see З. Ванкова, В. Иларева, and Д. Бечев, 'България, ЕС и "бежанската криза"', София (2017). (Z.Vankova, V. Ilareva and D. Bechev, 'Bulgaria, the EU and "the refugee crisis", Sofia (2017)). For a detailed comparison between the strategies, see А. Кръстева, От миграция към мобилност. Политики и пътища (София: Нов български университет, 2014), pp. 618-631. (A. Krasteva, From Migration to Mobility. Policies and paths (Sofia: New Bulgarian University, 2014).

144 National Startegy of the Republic of Bulgaria on Migration and Integration (2008-2015), p. 4, 17.

145 Ibid., p. 6.

146 National Startegy of the Republic of Bulgaria on Migration and Integration (2008-2015), p. 5.

147 National Startegy of the Republic of Bulgaria on Migration and Integration (2008-2015), p. 17.

148 The policy instruments in relation to Bulgarian citizens falls outside the scope of this study and therefore they are not presented in detail. For more information see, Z. Vankova, 'Specifics of Migration Management Policies', in I. Ivanova (ed.), *Current Trends in Cross-border Workforce Migration, in Labour Migration Trends and the free movement of people – the effects for Bulgaria* (Open Society Institute Sofia, 2011), p. 73, pp. 76-77.

149 Ibid., p. 73.

150 Ibid.

acquiring the Bulgarian citizenship.[151] It was, however, suspended due to the rise in unemployment that occurred at the outset of the global financial crisis.[152]

The second strategic goal was necessitated by the shortage of skilled specialist workers in different sectors at the time that the strategy was drafted,[153] such as construction, machine building and electrical engineering.[154] This was the first time that the issue of satisfying labour shortage demands through immigration emerged.[155] The government's vision was to pursue a balanced approach based on the EU's circular migration approach, i.e., the return of the immigrants to their country of origin after the expiry of their employment contract had to be regulated in advance.[156] Individual reception, branch quotas and bilateral employment agreements, where possible paired with a bilateral agreement for social security coordination, were envisaged as suitable mechanisms that were considered in line with the trends in the EU.[157] The branch quota determination procedure and the signing of bilateral agreements were not put into practice due to the decline in workforce demand which arose as a result of the genesis of the global financial crisis.[158]

Work on drafting a new Strategy began in 2010. The adopted second National Strategy in the Field of Migration, Asylum and Integration (2011-2020) marked a shift in the migration policy priorities: the focus was shifted away from legal migration and integration towards security,[159] in line with the governments' efforts to demonstrate its preparedness for its upcoming accession to the Schengen area.[160] The 2008 Strategy remained in effect and had to be transformed into a Migration and Integration Programme (2008-2015), which ultimately did not take place.[161] The last National Strategy on Migration, Asylum and Integration (2015 – 2020)

151 National Startegy of the Republic of Bulgaria on Migration and Integration (2008-2015), p. 21.
152 Vankova, 'Specifics of Migration Management Policies', p. 77.
153 National Startegy of the Republic of Bulgaria on Migration and Integration (2008-2015), p. 21.
154 Krasteva, Otova, and Staykova, 'Labor Migration in Bulgaria 2004-2009', p. 5.
155 Ibid.
156 Vankova, 'Specifics of Migration Management Policies', p. 23.
157 National Startegy of the Republic of Bulgaria on Migration and Integration (2008-2015), p. 28.
158 For more details, see Vankova, 'Specifics of Migration Management Policies', p. 79.
159 Krasteva, Otova, and Staykova, 'Labor Migration in Bulgaria 2004-2009', p. 11; Markova and Vankova, 'Bulgaria', p. 42.
160 National Strategy in the Field of Migration, Asylum and Integration (2011-2020), p. 13. OECD, 'International Migration Outlook', (2013), p. 216.
161 National Strategy in the Field of Migration, Asylum and Integration (2011-2020), p. 43.

was adopted in 2015.[162] It merged the three previous national strategies that were adopted since 2008 and updated them in light of the "refugee crisis".[163]

By mid-2007, Bulgaria had fully harmonised its legislation on migration in line with the EU *acquis*.[164] The Act on Foreigners transposed, amongst other things, the Long-term Residence Directive, the Family Reunification Directive, as well as some of the provisions of the Researchers' Directive 2005/71/EC.[165] The Blue Card Directive was initially transposed in 2011 and its full implementation was finalised in 2013 when the Act on Foreigners was harmonised with the Single Permit Directive.[166] The ICT Directive was transposed in 2016.[167] Certain provisions from the directives on labour migration were also transposed into the Act on Employment Promotion. Since the CEE countries were following a "moving target of EU norms",[168] full harmonisation with the *acquis communitaire* in the ambit of JHA required many subsequent amendments to be undertaken. For instance, the Act on Foreigners was amended over 35 times in order to fully meet the requirements stipulated by EU migration law.[169]

The Act on Bulgarian Citizenship was amended several times after the country's accession to the EU. The 2010 amendments, however, brought about an immense increase in the number of applications concerning the naturalisation procedure for foreigners of Bulgarian origin.[170] The amendments introduced a requirement that the application for the acquisition of Bulgarian citizenship should be accompanied by a certificate of Bulgarian origin, issued by the State Agency for Bulgarians Abroad and that the certificate should state the data on the basis of which the Bulgarian origin has been established (Article 15 (2)).[171] In addition, Article 15, Para 3 set a deadline of one month for issuing the certificate. Another important change in 2010 made it possible to submit the application for naturalisation through Bulgaria's diplomatic and consular offices (Article 29, Para 1) and

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162 Adopted by Decision No.437 of 12 June 2015 of the Council of Ministers.
163 Ilareva, 'Migration, Asylum and Citizenship Policies in Bulgaria', p. 70. Interview #1 with official, Bulgaria, July 2016.
164 D. Nedeva, 'State of Preparedness of the Republic of Bulgaria for Joining the Schengen Zone', (2007), p. 25.
165 SG No. 29/2007; SG No. 63/2007. See also OECD, 'Trends in International Migration: SOPEMI 2008 Edition', (2009), p. 232.
166 SG No. 70/2013.
167 SG No. 33/2016.
168 R. Koslowski, *Migrants and Citizens: Demographic Change in the European State System* (Cornell University Press 2000), p. 171.
169 Markova and Vankova, 'Bulgaria', p. 41.
170 National Strategy on Migration, Asylum and Integration (2015 – 2020), p. 27.
171 See SG No. 33/2010.

it set a deadline for the naturalisation procedure for persons of Bulgarian origin at the Ministry of Justice of no more than 12 months (Article 35, Para. 1, (2)), after which the Minister of Justice would make a proposal to the President of the Republic of Bulgaria for the issuing or refusal to issue of a decree (Article 34).

Between January 2012 and January 2017, 53 797 persons acquired Bulgarian citizenship, of which 36 228 were naturalised on the ground of being of Bulgarian origin.[172] The top five nationalities of persons whom acquired Bulgarian citizenship came from the Republic of Macedonia (25 447), Moldova (10 689), Ukraine (6 033), Russia (2 763) and Serbia (2 629).[173] The easy access to naturalisation for persons of Bulgarian origin allegedly led to many cases of fraud and corruption in the State Agency for the Bulgarians Abroad.[174] Another important post-accession development concerned the legislative amendments to both the Act on Bulgarian Citizenship and the Act on Foreigners in 2013, which was done with the aim of attracting foreign investment into the country.[175]

After Bulgaria's accession to the EU, the role of the bilateral employment agreements began to diminish, since the Member States started to slowly drop the transitional periods for Bulgarian workers.[176] 2011 saw the conclusion of an agreement with Israel, under which 3500 jobs were made available for construction workers in Israel in 2012.[177] Currently there are only three other bilateral agreements in force for the exchange of interns between Bulgaria on the one hand and Switzerland, France and Luxembourg on the other.[178]

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172 Researchers claim that naturalised foreigners of Bulgarian origin do not settle but rather they use their Bulgarian passports to move to another Member State. See Кръстева, От миграция към мобилност. Политики и пътища, p. 620.

173 Administration of the President of the Republic of Bulgaria, Activity Report of Commission on Bulgarian Citizenship and Bulgarians Abroad for the period 22 January 2012 – 18 January 2017.

174 Капитал, 'Гражданство: Българско. Цена: 3000 евро (без транспорта)' (Capital, 'Citizenship: Bulgarian. Price: 3000 EUR without transportation)', retrieved at: http://www.capital.bg/politika_i_ikonomika/bulgaria/2014/11/01/2410680_grajdanstvo_bulgarsko_cena_3000_evro_bez_transporta/ (accessed 24 November 2017).

175 See Article 14a of the Act on Bulgarian Citizneship and Articles 24, Para.1 (19) and (20), Article 25, para. 1 (16) and Article 25c of the Act on Foreigners. For more detils, see Ilareva, 'Migration, Asylum and Citizenship Policies in Bulgaria', p. 75.

176 For a full list of the agreements that were concluded, see European Migration Network, 'Temporary and Circular Migration in Bulgaria: empirical evidence, current policy practice and future options in EU Member States', (2011), pp. 18-21.

177 OECD, 'International Migration Outlook', (2014), p. 238.

178 Министерство на труда и социалната политика, Спогодби за заетост (Ministry of Labor and Social Policy, Employment Agreements), retrieved at: https://www.mlsp.government.bg/index.php?section=POLICIESI&I=268&lang= (accessed 24 Novemebr 2017).

In line with the latest National Strategy on Migration, Asylum and Integration (2015 – 2020), a new Act on Labour Migration and Labour Mobility (ALMLM)[179] was adopted in 2016.[180] It codified all of the previously transposed directives into the Act on Employment Promotion, as well as pending labour migration legislation, such as the Seasonal Workers' Directive. The Act has also provided a section on the possibility to conclude these types of agreements (Chapter 5), which are meant to create options for circular migration.[181] According to the Strategy, the Eastern Partnership countries are among the countries that are considered to be suitable for concluding bilateral agreements.[182]

7.3.3. Institutional framework

The specialised Migration Directorate of the Ministry of Interior (MoI) was established in 2004. It was tasked with exercising administrative control over the residence of third-country nationals by issuing residence permits, imposing coercive measures against foreign nationals residing irregularly in the country and managing the immigrant detention centres.[183] The establishment of a migration control authority was explicitly stipulated in the Roadmap for the Accession of Bulgaria to the EU.[184] In order to strengthen its administrative capacity in line with the European standards in this area, 2006 saw the implementation of a Twinning-light project in partnership with the Migration Service of Belgium.[185] The Directorate closely cooperates with the General Border Police Directorate of the MoI, which has an active role in border management, irregular migration and anti-trafficking control, as well as the State Agency for the Refugees, which is in charge of the procedures for granting international protection.[186]

The Ministry of Labour and Social Policy (MLSP) is responsible for the decision-making and implementation of polices relating to access to the labour market and integration with regard to third-country nationals, concluding bilateral labour and social security coordination agreements, as well as supporting Bulgarians abroad and EU citizens working by making them aware of their labour and social

179 Закон за трудовата миграция и трудовата мобилност, in force from 21 May 2016, SG 33/26 April 2016, last amendment SG 97/5 December 2016.
180 National Strategy on Migration, Asylum and Integration (2015 – 2020), p. 39.
181 Interview #1 with official, Bulgaria, July 2016.
182 National Strategy on Migration, Asylum and Integration (2015 – 2020), p. 37.
183 Vankova, 'Specifics of Migration Management Policies', p. 69.
184 Nedeva, 'State of Preparedness of the Republic of Bulgaria for Joining the Schengen Zone', p. 28.
185 Ibid.
186 Markova and Vankova, 'Bulgaria', p. 42.

protection rights.[187] The Employment Agency that was established in 2002 is the authority which is tasked with protecting the labour market and regulating access to the labour market to foreigners through the issuing of work permits to employers that wish to hire third-country nationals. The National Council on Labour Migration, which was a permanent advisory body under the Minister of Labour and Social Policy,[188] was transformed into the National Council on Labour Migration and Labour Mobility following the adoption of the new Act on Labour Migration and Labour Mobility. Its functions cover, *inter alia*, consultation and support in relation to the implementation of the Bulgarian policy on labour migration and labour mobility, including the admission of workers from third countries on the basis of bilateral agreements or on the basis of other compensatory measures, proposals for the List of occupations for which there is a shortage of highly-qualified specialists and the List of economic sectors, the implementation of which depends on seasonal changes (regulated in Chapter 3 of the Implementing Regulation of the ALMLM).

The Ministry of Foreign Affairs (MFA) participates in decision-making in the field of foreign and migration policy and it is responsible for issuing visas through the diplomatic and consular offices abroad.[189] The SABA is tasked with implementing the government's policy towards Bulgarians abroad, which together with the Ministry of Justice and the Administration of the President also participates in the naturalisation procedure for Bulgarians living abroad.[190]

A positive development that was brought by the second National Strategy on Migration was the establishment of the National Council on Migration Policy in 2011, which was responsible for organising and controlling the implementation of the Strategy, as well as coordinating the different state institutions that are involved in Bulgaria's migration policy.[191] Before that, there was no single institution that was in charge of the overall coordination of Bulgaria's migration policy and its participation in the EU decision-making process.[192] This Council was closed in 2014 for optimisation reasons in order to avoid duplication of advisory council functions at the national level and to improve the implementation of

187 National Strategy on Migration, Asylum and Integration (2015 – 2020), p. 9.
188 Vankova, 'Specifics of Migration Management Policies', p. 75.
189 Ibid., p. 69. National Strategy on Migration, Asylum and Integration (2015 – 2020), p. 9.
190 For more info, see Ilareva, 'Migration, Asylum and Citizenship Policies in Bulgaria', p. 76.
191 Markova and Vankova, 'Bulgaria', p. 42. Established by Council of Minsiters Decree No 89/07.04.2011.
192 Vankova, 'Specifics of Migration Management Policies', p. 75.

the government's horizontal policies.[193] The latest Strategy on Migration envisaged the creation of the National Council on Migration and Integration under the Council of Ministers, which was established in 2015.[194]

7.4. Policy and legal instruments fostering and incorporating circular migration elements

7.4.1. Developed national measures[195]

According to the report on circular migration that was prepared by the Bulgarian National Contact Point, following the request of the European Migration Network (EMN), the notion of temporary and circular migration persists in its strategic documents, even though circular migration is not a priority of Bulgaria's migration policy.[196] In most cases, "circular migration" is referred to as an EU term that is derived from the EU migration policy, to which Bulgaria adheres to as part of its national strategy on migration.[197] Furthermore, one of the interviewed officials stressed that this term had lately been forgotten at the EU level, and he had to remind his colleagues at the high-level meetings that this concept existed - especially in the context of the GAMM.[198]

Three of the National strategies on migration highlight the fact that circular migration needs to be both encouraged and promoted.[199] The following extract from the first national strategy shows how Bulgarian policy-makers have understood the concept of circular migration:

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193 Министерски съвет на Република България, 'Закрити са пет консултативни съвета' (Council of Minsiters of Republic of Bulgaria, 'Five consultative bodies are being closed'), retrieved at: http://www.government.bg/cgi-bin/e-cms/vis/vis.pl?s=001&p=0228&n=5792&g= (accessed 27 November 2017).

194 National Strategy on Migration, Asylum and Integration (2015 – 2020), p. 51.

195 This study also included a review of judgments of Bulgarian national courts. However, no national cases were identified which had bearing to the topic of circular migration.

196 European Migration Network, 'Temporary and Circular Migration in Bulgaria: empirical evidence, current policy practice and future options in EU Member States', p. 10.

197 National Strategy on Migration and Integration (2008-2015), p. 23; National Strategy in the Field of Migration, Asylum and Integration (2011-2020), p. 40; National Strategy on Migration, Asylum and Integration (2015 – 2020), p. 49.

198 Interview # 1 with official, Bulgaria, July 2016, Annex III.

199 National Strategy on Migration and Integration (2008-2015), p. 26, p. 35; National Strategy in the Field of Migration, Asylum and Integration (2011-2020), p. 40; National Strategy on Migration, Asylum and Integration (2015 – 2020), p. 49.

> "The large-scale acceptance of third country nationals is not a good solution and has to be avoided, as the experience of other countries shows. An organized and balanced reception of third country nationals is undertaken. Their return to the country of origin is regulated after the expiry of their contract. In this way the European initiative at the Community level for the promotion of the so-called „circular" migration is implemented in practice".[200]

One of the interviewed state officials stated that the EU had adopted this term, but that it was up to the national authorities to provide the concept with further substance: "We need to rather see what is behind this term in practice; or more precisely, which existing processes can be likened to or classified as a section, subsection, or type of circularity".[201] The respondent added that he understood this concept as primarily trying to avoid the negative effects of "brain drain".[202] It signified a process whereby persons moved between their country of origin and an EU Member State. According to this state official, the circular migration process would lead to a win-win situation where on the one hand, the persons would be able to increase their qualifications, acquire know-how, experience, knowledge and skills while working in the destination country and assisting its economy. On the other hand, by returning from their country of destination, they could pass on this experience to others who would benefit from "the enrichment" on the basis of the "training of trainers" principle.[203] This concept was described in a similar way by one respondent who was working for an international organisation in Bulgaria.[204]

Unlike the respondents in Poland, the interviewed stakeholders in Bulgaria did not link this concept to a specific legal instrument or to a national policy. Rather, the respondents described it as something that was not taking place at the present moment. One of the interviewed lawyers stressed that she did not have any clients that experienced problems as a result of their circulation, because voluntary circulation was "mission impossible".[205] In response to the question of how the term circular migration was to be understood, another interviewee said that in order for the country to facilitate circular migration, the politicians had to first gain an understanding that labour migration was necessary, and that people who would

200 National Strategy on Migration and Integration (2008-2015), p. 23.
201 Interview # 1 with official, Bulgaria, July 2016, Annex III.
202 Interview # 1 with official, Bulgaria, July 2016, Annex III.
203 Interview # 1 with official, Bulgaria, July 2016, Annex III.
204 Interview# 12 with expert from international organisation, June 2016, Annex III.
205 Interview # 8 with lawyer, Bulgaria, July 2016, Annex III.

come to work for this purpose had to be provided with a circle of rights.[206] The interviewee stressed that in practice, however, this approach was not mentioned in either the public, political or law-making discourse. She added that none of the politicians in the country were prepared or willing to clearly state that the country needed immigrants in the current climate.[207]

The response given by one of the employers' organisation representatives was similar in nature, stating that the current Bulgarian politicians "did not want to hear about migration".[208] This interviewee added that there was a large discrepancy between the actions of politicians and the administration, because the latter were obliged to develop migration policies in Bulgaria, as a result of their EU law obligations. One interviewee who represented another employers' organisation also stressed that the country "unfortunately" needed foreign workers in specific sectors.[209] The representative remarked that for business organisations it was better if this migration was of a temporary and circular character, because this would better match the changing needs of the labour market. By way of contrast to other interviewees, this employers' organisation opined that the current legislative framework was facilitating circular migration.[210] The trade union representatives, on the other hand, mentioned that the current legal framework and the recently adopted ALMLM were "fairly reasonable" and that they did not see the need for reforms in relation to the migration of third-country nationals.[211]

Moreover, neither the Migration Strategies nor the EMN report on circular migration explicitly pointed to any national instruments that would support the implementation of EU's circular migration approach in Bulgaria. The EMN report stressed that "the understanding of optimal migration" was based on the notion of temporary and circular migration: "the economic situation is very dynamic, the labour market is flexible; migration, which can quickly and precisely respond to its changing requirements, is seen as the best option".[212] Therefore, the EMN study concluded that some of the instruments that could be identified in the first 2008 Strategy - such as the determination of quotas or the identification of labour

206 Interview # 9 with lawyer, Bulgaria, July 2016, Annex III.
207 Interview # 9 with lawyer, Bulgaria, July 2016, Annex III.
208 Interview # 6 with representative of employers' organisation, August 2016, Annex III.
209 Interview # 16 with representative of employers' organisation, October 2016, Annex III.
210 They referred to Chapter II "Labour Migration from third countries" of the ALMLM.
211 Interview # 5 with trade union representative, July 2016, Annex III.
212 European Migration Network, 'Temporary and Circular Migration in Bulgaria: empirical evidence, current policy practice and future options in EU Member States', p. 12.

deficits in certain professions with the participation of social partners - pertained to the notion of temporary migration.[213]

Previous research on this topic, as well as the interviews that were conducted as part of this study, highlight the bilateral employment agreements as being among one of the main national instruments that has the potential to encourage circular migration.[214] One of the respondents, representing the state administration, stated that the National Strategies aimed to create a balance between the policies on immigration, emigration and the policies that were targeted at "Bulgarians abroad".[215] Therefore, the 2008 strategy envisaged the conclusion of "bilateral agreements for labour migration regulation" with third countries, which were important in relation to the latter policy.[216] This means that in the Bulgarian case, the implementation of the EU's circular migration approach through bilateral agreements is aligned with the country's policy of attracting ethnic Bulgarians. This is the target group for both circular migration and permanent settlement policies.

In 2008, the draft labour migration agreements that were developed on the basis of a template approved by the National Council on Labour Migration - were sent to four countries: Moldova, Macedonia, Ukraine and Armenia, and a process of consultation was initiated.[217] According to public officials that were interviewed in 2010 as part of a study for the Open Society Institute in Sofia, and within the parameters of the current study, no agreements were ever signed due to the on-going financial crisis.[218] In 2016, the adopted Act on Labour Migration and Labour Mobility (ALMLM) provided a section on the possibility to conclude these types of agreements, which were meant to create options for circular migration.[219] As was envisaged by the 2008 Strategy, priority is to be given to those countries with which there is an on-going negotiation for the conclusion of social security coordination agreements or already signed social security agreements (Article 62 (3) of the ALMLM).

213 Ibid.
214 Vankova, 'Subsection B.7: Migration', p. 57. Interview # 1 with official, Bulgaria, July 2016, Annex III. See also Open Society Institute Sofia, 'Current Trends in Cross-border Workforce Migration, in Labour Migration Trends and the free movement of people – the effects for Bulgaria', p. 10.
215 This term is usually used to refer to foreigners of Bulgarian origin, rathar than Bulgarian citizens who emigrated.
216 Interview # 1 with official, Bulgaria, July 2016, Annex III.
217 Vankova, 'Specifics of Migration Management Policies', p. 78.
218 Ibid.
219 See Chapter 5 of the ALMLM. Interview #1 with official, Bulgaria, July 2016, Annex III.

According to one interviewed official, the model of the future agreements would follow the framework agreement that was signed with Israel,[220] which was based on the 2008 agreement template and approved by the National Council on Labour Migration.[221] The interviewee added that during the negotiations of the agreement with Israel it became clear that it was better to apply a framework agreement approach and to implement it through a procedure for each specific sector.[222] However, this agreement was modified during the negotiations due to the demands that were posited by Israel. The agreement currently provides for temporary employment in the construction sector for a maximum of three years, with no option for re-entry and, more importantly, it does not allow for circularity.[223]

In the end of June 2017, the government approved a framework agreement for temporary labour migration with Armenia, Moldova and Ukraine.[224] It was remarked that "Signing agreements with Armenia, Moldova and Ukraine will provide an opportunity to provide workers for economic sectors where there is a shortage of labour".[225] At the same time, pending amendments to the Act on Bulgarian Citizenship aim "to further deepen the work with the Bulgarian communities in Ukraine" and to create facilitated access for work and permanent residence to these foreigners in Bulgaria.[226] The approved framework agreement for temporary labour migration will be used in the negotiations with these countries. Therefore, the framework agreement with Israel, which serves as a model agreement for future agreements with the Eastern Partnership countries, is analysed in the sections that focus on the different policy areas. The sections also provides comparisons with the special measures envisaged for the foreigners of Bulgarian origin.

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220 Спогодба между правителството на Република България и правителството на Държавата Израел за посредничество и временна заетост на граждани на двете държави (Agreement between the Government of the Republic of Bulgaria and the Government of the State of Israel, regarding recruitment and temporary employment of citizens of the two countries), adopted with Council of Minsiters Decree No 852/24.November 2011, in force from 20 December 2011.

221 Interview # 1 with official, Bulgaria, July 2016, Annex III.

222 Interview # 1 with official, Bulgaria, July 2016, Annex III.

223 Article 5 of the Agreement. Interview # 1 with official, Bulgaria, July 2016, Annex III.

224 Mediapool.bg, Валери Симеонов: Ускоряваме даването на българско гражданство, 56 000 души чакат отдавна (Valeri Simeonov: We accelerate the granting of Bulgarian citizenship, 56 000 people have been waiting for a long time), retrived at: http://www.mediapool.bg/valeri-simeonov-uskoryavame-davaneto-na-balgarsko-grazhdanstvo-56-000-dushi-chakat-otdavna-news265934.html (accessed 26 November 2017).

225 Ibid.

226 Ibid.

7.4.2. EU instruments

With regards to EU instruments, the Bulgarian "catch-up and imitation" model has persisted long after its accession to the EU. However, this time the "catch up" part concerns the accession to the Schengen Area. The process of Europeanisation continues through a rushed "copy and paste" transposition of EU law, which leads to restrictive and unpractical provisions.[227] As one of the interviewed lawyers said: "Bulgarian lawmakers create rules artificially and impose them on Bulgarian society even if they are not adapted to our reality".[228] A representative of the administration confirmed that the current state of the legal framework on legal and irregular migration showed that the integration of international and European legislation into Bulgarian law has led to fragmentation.[229] The Act on Legal Acts imposed a requirement to perform an analysis of the existing legal framework on the relevant topic and if necessary, amendments were proposed in order to avoid contradictory regulatory decisions. Despite that, the interviewee stressed that there were cases where the amendments had not passed through the Parliament or legal acts had to be amended again due to an inaccurate or incomplete implementation of the requirements of the European legislation.[230]

Unlike Poland, Bulgaria has not been an active Member State and has acted primarily as "a policy taker", meaning that it has generally followed the mainstream views in relation to the EU's Migration policy.[231] This was also confirmed by one of the interviewees who was previously engaged in the EU policymaking process: "Every time we go to a meeting on integration and asylum, Bulgaria is absent. They don't really participate".[232] This is mainly due to the weak administrative capacity in migration policy management and the pre-accession inertia as a "policy taker",[233] as well as the imposed CVM mechanism and the efforts of Bulgaria to prove that it is a loyal EU Member State in line with the country's ambition to join the Schengen Area.[234] The latter also explains why the country's

227 Interview # 9 with lawyer, Bulgaria, July 2016, Annex III.
228 Interview # 9 with lawyer, Bulgaria, July 2016, Annex III.
229 Interview #13 with state official, Bulgaria, September 2016, Annex III.
230 Interview #13 with state official, Bulgaria, September 2016, Annex III.
231 M. Lessenski, 'The EU New Member States as Agenda Setters in the Enlarged European Union. Country Report: Bulgaria', (2009), p. 8, p. 46. Vankova, 'Specifics of Migration Management Policies', p. 82.
232 Intreview # 12 with academic, Italy, May 2013, Annex III.
233 Vankova, 'Specifics of Migration Management Policies', p. 82.
234 Lessenski, 'The EU New Member States as Agenda Setters in the Enlarged European Union. Country Report: Bulgaria', p. 46.

approach to migration has been primarily "securitised", e.g., based on anticipation of soft security challenges in this area.[235]

Bulgaria, due to its geographical location, cannot make use of the Local Border Traffic Agreements that exist in relation to the Eastern Partnership countries. Therefore, the analysis in the following sections focuses on the legal migration directives, which Bulgaria has transposed into its national law (the transposition of the new Researchers' and Students' Directive is currently underway). It also considers the initiatives under the Mobility Partnerships that relate to circular migration. Visa facilitation agreements are not covered by this chapter, since they have already been presented in Chapter 4.

7.5. Entry and re-entry conditions – instruments at the EU and national level

7.5.1. National instruments

General framework

The Bulgarian Act on Foreigners in the Republic of Bulgaria (AF) establishes the terms and the procedures under which foreigners may enter, reside and leave the Republic of Bulgaria (Article 1 of the AF). Visas are not required in line with Council Regulation (EC) No. 539/2001 of 15 March 2001, other acts of the European Union, international agreements or acts of the Council of Ministers, as well as in cases where the foreigner has a valid permit for continuous, long-term or permanent residence in Bulgaria (Article 8, Paras 2 and 3 of the AF). The visas that are relevant to this research are short-stay visas for the purposes of planned stay on the territory of the Republic of Bulgaria (Category C) and long-stay visas (Category D).[236]

Short-stay visas with the purpose of planned stay must be issued with for a period not exceeding three months, within each six-month period, to be counted from the date of first entry to the Republic of Bulgaria. They may be issued for multiple-entry and their validity cannot be longer than five years (Article 14, Paras 1 and 4 of the AF). National long-term visas with a validity of up to six months and which grant the right to stay in Bulgaria for up to 180 days can be issued when

235 Ibid.

236 For more details see Article 9 in conjunction with Article 14 of the AF. Transit visas regulating these types of stays fall outside the scope of this study and therefore are not presented in detail.

the foreigner intends to apply for continuous, long-term or permanent residence on one of the grounds stipulated by the law (Article 15, Para 1 of the AF). Long-stay visas with a validity term of up to one year and with right of stay for up to 360 days may be issued to foreigners only in specific cases that are listed in the Regulation on the terms and procedure for issuing visas and for determining the visa regime.[237] Once a residence permit has been issued, the visa will be annulled (Article 15, Para 4 of the AF).

The Act on Foreigners lists 25 cases whereby foreigners may be refused a visa and therefore barred from entering in the country, *inter alia*, if: they had or could jeopardise the security or the interests of the Bulgarian State with their activities or about whom there is data that they act against the security of the country, they had made an attempt to enter the country or to pass through it using false or forged documents, they do not have sufficient means to cover their stay in the country – i.e., the obligatory insurances that they must have during their stay in the country and funds for ensuring that they are able to return back.[238]

Unlike the case of Poland, the current Bulgarian visa regime does not provide any visa facilitation for Eastern Partnership countries or for Russia. Applicants are required to pay all the appropriate fees, unless they fall under one of the exceptions to the EU visa facilitation agreements. The only facilitation for nationals of Ukraine and Russia is provided through the outsourced Visa Application Centres that are operated by the VFC Global Company.[239] In 2015, several members of the Bulgarian Parliament introduced a draft resolution that was to be voted upon by the Parliament and which concerned the abolishment of visas for Russian citizens –

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237 Наредба за условията и реда за издаване на визи и определяне на визовия режим, in force from 4 April 2011, Adopted by Council of Ministers Decree No 198/ 11 July 2011, SG No. 55/19 July 2011, last amendment SG No 57/28 July 2015.
According to Article 9 (2), these are foreigners who carry out scientific research or who are students on one-year educational programmes, post-graduate students or trainees, foreigners, sent on a business trip by a foreign employer in order to perform specific tasks, related to the control and coordination of fulfilment of a contract for tourist services, as well as to foreigners, sent on a business trip by a foreign employer for making and maintaining investments, certified following the procedure laid down in the Investment Promotion Act.

238 See Article 10 of the AF for full list of the grounds on which visas may be refused.

239 Visa application centres are available in the following cities in Russia: Moscow, Sankt Petersburg, Ekaterininburg, Novosibirsk, Kazan, Samara, Nijni Novgorod, Krasnodar, Krasnoyarsk, Rostov on Don, Vladivostok, Khabarovsk, Irkutsk, Ufa, Sochi and Kaliningrad; and in Kiev, Odessa, Lvov, Lutsk, Ivano-Frankovsk, Donetsk, Kharkov and Simferopol in Ukraine. Source: Ministry of Foreign Affairs, Visa for Bulgaria, retrieved at: http://www.mfa.bg/en/pages/109/index.html (accessed 26 November 2017).

a measure which, in itself, was contrary to Regulation No. 539/2001.[240] The Ministries of Interior and Foreign Affairs intimated their positions to the Parliamentary Commission on Economic Policy and Tourism, stressing that there were already facilitations in existence, namely the outsourced Visa Application Centres and the visa free regime for holders of Schengen visas that have been issued by other Member States.

According to the Act on Labour Migration and Labour Mobility (ALMLM), the initial application for access to the Bulgarian labour market is only possible when the applicant is outside the territory of Bulgaria (Article 5, Para 2 of the ALMLM). The authorisation for access to the labour market is subject to: the negative results of a labour market test that is to be performed by the employer; proof that in the previous 12 months, the total number of third-country nationals working for the local employer does not exceed ten per cent of the average number of workers employed (referred to in the text as the ten per cent requirement);[241] having been offered work and pay conditions that are no less favourable than the conditions offered to Bulgarian citizens in the respective labour category and finally, they must possess specialised knowledge, skills and professional experience that is required for the post in question (Article 7, Para 1 of the ALMLM).

The labour market test is carried out by the employer by publishing a job advert, containing information about the requirements for taking up the position in question, the remuneration and other social benefits. The job vacancy has to be published in both the national and local mass media, as well as in the local Labour office (Бюро по труда) at the potential place of work of the applicant (Article 4, Para 1 of the Implementing Regulation of ALMLM). The duration of this labour market test is required to be between 15 days and three months. The results of the test are used by the Employment Agency in order to establish the "objective impossibility" of the employer to employ a Bulgarian citizen, a citizen of another Member State of the European Union, of a country which is party to the Agreement on the European Economic Area, or of the Swiss Confederation, or any other

240 Народно събрание на Република България (National Assembly of the Republic of Bulgaria), retrieved at: http://www.parliament.bg/pub/cW/20150619090636Volen-VIZI.pdf (accessed 26 November 2017).

241 According to Article 14 (1) of the ALMLM, the Minister of Labour and Social Policy, where proven appropriate, may authorise labour market access on a case-by-case basis outside these limitations. This will change after 23 May 2018 when the latest amendments of the Act on Labour Migration and Labour Mobility of 16 March 2018 will enter into force (SG No. 24/16 March 2018). The amended Article 7 (2) ALMLM now increases this per cent to respectively 35 % for small and medium-sized enterprises and 20 % for large enterprises.

foreigner legally residing in Bulgaria and whom have the right to fill the vacant position.[242]

There are few exceptions to the work authorisation procedure that are predominantly based on the EU laws that are applicable to the following types of workers: ship crew members, workers with long-term and permanent residence permits, asylum seekers and recognised refugees in line with the Act on Asylum and Refugees, foreigners whose employment is a result of the implementation of an international treaty, family members of Bulgarian and EU citizens, diplomat mission members and accredited journalist from foreign media outlets and foreigners pending expulsion after one year of the issuing of the expulsion order (Article 9, Para 1 of the ALMLM).

Foreigners of Bulgarian origin are entitled to facilitated access to the labour market. Article 8, Para 2 (1) of the ALMLM states that they may be granted labour market access until they receive a permanent residence permit under a rather ambiguous provision that lists categories of foreigners who are not allowed access to the Bulgarian labour market. One of the provisions transposing the Single Permit Directive stipulates that they are exempted from the labour market test and the ten per cent requirement (Article 15, Para 4 of the ALMLM). As was already mentioned above, these foreigners often come from the Eastern Partnership countries. However, this provision has not been triggered at any time over the last ten years.[243] This is not surprising when one considers that this category of foreigners are entitled to facilitated access to naturalisation.

According to Article 7 (4) of the ALMLM, the work permits are issued with a period of validity of one year only and the overall duration of the work authorisation can be prolonged for up to three years if the circumstances for its issue have not changed (Article 7 (5) of the ALMLM). The fee for issuing or prolonging the work permit is 400 BGN (approximately 200 EUR), which is paid by the employer (Article 7 (8) of the ALMLM).[244] The initial application for access to the labour market, as well as the follow-up applications after the three-year period that is contained in Article 7 (5) has elapsed, are made when the foreigner is physically outside the territory of Bulgaria. Furthermore, according to Article 7 of the Implementing Regulation of the ALMLM, upon reaching the maximum work

242 The categories are listed under Article 9, Para. 1 (2 – 6) of the ALMLM.
243 Data obtained from the Employment Agency in October 2017.
244 This provision was amended in the end of 2017 (SG No.97/ 5 December 2017) and the fee is now reduced from 400 BGN to 100 BGN (Apr. 50 BGN).

authorisation period of three years under Article 7 (5) of the ALMLM, a new work authorisation application can only be submitted after a three month interruption between the expiration of third-country national's permit and the request for a new starting period of employment.

Bilateral framework agreement regarding recruitment and temporary employment

As was already mentioned above, the bilateral framework agreement that was concluded between Bulgaria and Israel is to serve as a model agreement for those that will be negotiated with some of the Eastern Partnership countries. The draft agreements that were approved by the Council of Ministers for the opening of the negations with Ukraine, Moldova and Armenia are not publicly accessible, however. Therefore, the Israeli-Bulgarian agreement is presented and analysed in this chapter.

According to Article 1, Para 1 of the bilateral agreement, the term "temporary employment" means the legal employment of a national of one of the states in the territory of the other state by an employer holding a valid work permit for a foreign worker for a limited period of time. The economic activity and its duration can differ and this is regulated through the Implementation Procedures, which are elaborated upon as part of the Agreement, but cannot exceed the maximum authorised duration as regulated by the national law of the receiving state (Article 1, Para 2). The temporary employment must be in accordance with "the national law, regulations, rules, procedures and governmental decisions of the receiving state". At the end of the employment period, the worker is obliged to leave the territory of the receiving state.

The Agreement does not provide for any explicit visa facilitation measures: "The selected candidates will be provided with the necessary documents for temporary entry, residence and work in the host country in accordance with its national legislation on specific economic activity" (Article 7, Para 2). The agreement does not provide for any circular migration options either. However, it stipulates unequivocal regulations on return, stating that when signing their employment contract in the sending state before their departure, workers are also required to sign a declaration stating that they will return to the sending state after the expiry of their residence permit in the receiving state (Article 12, Para 1). Furthermore, the contracting parties are required to take practical steps to ensure the prompt and effective return of their workers to the sending state after the expiry of their permits in the receiving state (Article 12, Para 2).

7.5.2. EU instruments

7.5.2.1. Legal instruments aimed at circular migration facilitation

Blue Card Directive

Residence and work permit of the "EU Blue Card type" can be granted to foreigners that hold a visa under Article 15, Para 1 and who are identified as highly-qualified workers pursuant to the provisions of the ALMLM (Article 33κ, Para 1 AF). This permit is issued after a decision of the Employment Agency for a period of one year and it can be renewed if the circumstances for its issuance have not changed. In cases where the term of the labour contract is shorter than one year, the permit is issued for the period of duration of the contract, extended by three months (Article 33k, Para 2 AF).[245]

The Employment Agency issues the work authorisation, which is part of the Blue Card permit, within 15 days after the application has been submitted in line with the general application procedure that is contained in Article 7, Para 1 of the ALMLM. The 10 % requirement does not have to be fulfilled as this is waived for Blue Card applicants. This is done in cases when foreigners have the required professional qualification and the gross salary referred to in the foreigners' labour contract is at least 1.5 times higher than the average salary in Bulgaria, according to the data available for the last 12 months before the conclusion of the employment contract (Article 17, Para 2 of the ALMLM). Even though this provision only stipulates a requirement for a higher education qualification, Article 15, Para 2 in conjunction with Article 2, Para 1 (4) of the Implementing Regulation of ALMLM requires both higher education qualification and professional experience, which is contrary to what is stipulated in Article 2 (g) of the Blue Card Directive.[246]

Unlike Poland, following the general application procedure, Bulgaria currently restricts the application for this permit to foreigners who are residing in a third country.[247] After the expiration of the initial term, the employer needs to perform another labour market test (Article 17, Para 1 of the ALMLM in conjunction

245 The amendements to the AF from December 2017 (SG No 97/ 5 December 2017) now provide the possibility for extending the validity of the Blue Card permit for up to four years (Article 33k, Para 2 AF).

246 This also violates Article 15 of the Act on Legal Acts, SG No 27/3 April 1973, last amendmend SG No 34/3 May 2016.

247 The amendements to AF from December 2017 (SG No 97/ 5 December 2017) now provide the possibility for Blue Card application from inside the country (Article 33k, Para 1AF).

with Article 18 and Article 15, Para 1 (2) of the Implementing Regulation of the ALMLM). The labour market test will be waived only if the profession is included in a List of professions for which there is a shortage of highly-qualified specialists.[248]

According to Article 18 of the ALMLM, the Minister of Labour and Social Policy approves this list on the basis of a motivated proposal of the nationally representative employers' organisations and after discussion at the National Council for Labour Migration and Labour Mobility and at the National Council for Encouragement of Employment. The list may be updated annually by 31 January.[249] In 2016, after more than two years of lobbing by the IT sector in Bulgaria, the government exempted several IT positions from this procedure on the basis of Article 18 of the ALMLM.[250]

The authorisation decision to exercise highly-qualified employment, when a certain profession is included in this list, is issued within 15 days after the application has been submitted. This is done in line with the general application procedure in compliance with Article 17, Para 2, (1), where the gross salary specified in the labour contract of the third-country national worker is at least twice as high as the average salary in the Republic of Bulgaria according to the available data for the last 12 months before the conclusion of the labour contract (Article 18, Para 3 of the ALMLM).

As was already mentioned, according to Article 7 of the Implementing Regulation of the ALMLM, upon reaching the maximum work authorisation period of three years under Article 7 (5) of the ALMLM, a new work authorisation application can be submitted only after there has been a three-month interruption period between the expiry of a third-country national's permit and employer's application for a new period of employment. At the time of writing of this study, the Bulgarian legislation did not provide for any exception to this rule for Blue Card

248 This will change after 23 May 2018 when the latest amendments of the Act on Labour Migration and Labour Mobility of 16 March 2018 will enter into force (SG No 24/16 March 2018). The amended Article 17 (2) ALMLM now exempts Blue Card applications from the previously required labour market test.

249 This list will be abolished after 23 May 2018 when the latest amendments of the Act on Labour Migration and Labour Mobility of 16 March 2018 will enter into force (SG No 24/16 March 2018).

250 Interview # 18 with representatives of IT company, Bulgaria, September 2016, Annex III. For the full list, see: MLSP, List of professions for which there is a shortage of highly-qualified specialists, retrieved at: https://www.mlsp.government.bg/ckfinder/userfiles/files/politiki/zaetost/zakonodatelstvo/Zapoved_profesii.PDF (accessed 27 November 2017).

holders.[251] If the administration applies this requirement to the Blue Card holders who are approaching their first permit renewals, Bulgaria would violate the *effet utile* of the directive, which is to "attract and retain highly qualified third-country workers".[252]

In 2016, the European Commission launched infringement proceedings against Bulgaria for the fees charged by the Ministry of Interior for issuing residence permits to foreigners.[253] According to the Commission, the amount of the fees charged was not in compliance with the EU Long-term Residence Directive, the Family Reunification Directive, the Students' and Researchers' Directives, the Blue Card Directive and the Single Permit Directive. The amended Tariff No 4[254] has led to a substantial decrease in the amount of fees charged by the MoI. The fees for residence permits for a duration of one year under the Researchers' Directive (2005/71/EC), the Blue Card Directive and the Single Permit Directive were reduced from 555 BGN (284 EUR) to 155 BGN (79 EUR), where 45 BGN (23 EUR) is paid for the ID card and 110 BGN (56 EUR) for the residence right (Article 10б, Para 3 of Tariff 4).

Seasonal Workers' Directive

In line with the directive, the Act on Foreigners introduced two authorisation regimes for seasonal workers: seasonal work for up to 90 days on the basis of a short-term visa[255] (Article 24 л, Para 1 of the AF) and seasonal work for no less than 90 days and no more than nine months (Article 24к of the AF). The Minister of Labour and Social Policy approves a List of the economic sectors, including activities, whose implementation depends on the change of the seasons. This list is drawn up after consultations with the National Council for Labour Migration and Labour Mobility (Article 25, (1) of the ALMLM). Currently, the list covers two sectors: agriculture, forestry and fisheries and hotels and restaurants.[256]

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251 Amendments to ALMLM from December 2017 (SG No. 97/ 5 December 2017) regarding the renewal procedure of the Blue Card permit, now exempt Blue Card holders from this interruption in the employment and application from outside the country (Article 17, Para 5 in conjunction with Article 5 (2) ALMLM).

252 For more details on this interpretation, see Chapter 5 and Steve Peers et al., *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 2: EU Immigration Law* (Martinus Nijhoff Publishers, 2012), pp. 51-56.

253 Infringement number 20164080, decision date 13 July 2017 concerning Incorrect implementation (disproportionate charges) of Directive 2003/109/EC and other Directives by Bulgaria.

254 Tariff No. 4 on the fees collected in the system of the Ministry of Interior under the State Fees Act SG 24/ 21 March 2017.

255 In case a visa is required.

256 Adopted by Order РД-01-47 /17 January 2017 of MLSP.

The "Permit for seasonal worker" granting the right to continuous residence can be obtained by foreigners who meet the requirements for access to the labour market in accordance with the ALMLM and who have obtained a visa under Article 15, Para 1 of the AF (Art. 24κ, (1) of the AF). As part of the application process for this type of seasonal work, the employer needs to perform a labour market test (Article 20, Para 1 (2) in conjunction with Article 2, Para 1 (2) and Para 2 (1) of the Implementing Regulation of the ALMLM). The permit for a seasonal worker is issued upon the submission of a single application procedure and after a positive decision has been taken by the Employment Agency. It covers the duration of the labour contract, which must be for no less than 90 days and no more than nine months (Article 24k, Para 2 and 3 of the AF). The Employment Agency issues the work authorisation, which is part of the permit for the seasonal worker, within 15 days after an employer has submitted an application (Article 24, Para 1 (2) of the ALMLM). This permit is issued on the basis of an accelerated procedure for those candidates whom have worked, at least once, as a seasonal worker at any point over the last five years in Bulgaria (Article 24k, Para 4). However, this procedure is neither detailed in the Implementing regulation of the ALMLM, nor in the Regulation on the issuance of visas.

In order to carry out seasonal work for up to 90 days, foreigners must have a valid visa for the purposes of seasonal work, where this is required, and the employment must be registered by the Employment Agency on the basis of a declaration submitted by the employer in line with the ALMLM and its Implementing Regulation (Article 24k, Para 1 of the AF in conjunction with Article 24, Para 3 of the ALMLM). In line with Article 20 of the directive, the employer is obliged to submit to the Employment Agency evidence that the seasonal worker will be provided with appropriate accommodation, that the health and safety requirements have been fulfilled (Article 28 of the ALMLM).

As a result of the lobbying efforts that were carried out by employers working in the ambit of tourism, the Implementing Regulation of the ALMLM was amended in June 2017 so as to facilitate the recruitment of foreigners to carry out seasonal work for up to 90 days.[257] The amendments stipulate that no labour market test is to be applied for this category of workers (Article 32, Para 1, (2) and Para 2 of Implementing Regulation of ALMLM) and that employers are not required to submit documents proving the education and experience of these categories of workers in line with the general application for access to the Bulgarian labour market (Article 32, Para 1, (2) of the Implementing Regulation of ALMLM).

257 SG No. 48/16 June 2017.

7.5.2.2. Instruments that contain some circular migration elements

GAMM instruments

As was already mentioned, Bulgaria cannot make use of the local border traffic agreements with regards to the Eastern Partnership countries and it is part of the EU visa facilitation agreements, which were already discussed in Chapters 4 and 6. Therefore this section focuses only on the Mobility Partnerships. The country has praised the GAMM,[258] supported the Eastern Partnership and joined the Mobility Partnerships that have been signed with five of the Eastern Partnership countries. According to the last Strategy, this is due the fact that Bulgaria identified the Eastern Partnership countries as its main partners within the context of the GAMM.[259] However, Bulgaria is also interested in participating in the variety of the GAMM initiatives with other migrant sending countries to the EU.[260] It may be expected, therefore, that the future bilateral agreements with the Eastern Partnership countries will become part of the Mobility Partnerships, since this was the model before the effects of financial crisis had trickled down in 2009.[261]

Currently, Bulgaria primarily utilises the GAMM channels so as to initiate negotiations for the conclusion of bilateral social security coordination agreements.[262] In addition, it participates in the projects that are being implemented by the ICMPD and the IOM in the Eastern Partnership countries. However it does not participate in any circular migration initiatives.

Intra-corporate Transferees' Directive

According to Article 33п Para 1, foreigners can obtain "permit for persons transferred through intra-corporate transfer", thereby granting them the right to continuous residence so long as they meet the requirements for access to the labour market under the provisions of the ALMLM and if they possess a visa in accordance with Article 15, Para 1 of the AF. This permit is issued following a decision by the Employment Agency on the basis of a single permit procedure, for a period of one year and it can be renewed if the circumstances for its issuance have not changed. The employer is exempted from performing a labour market test

258 Lessenski, 'The EU New Member States as Agenda Setters in the Enlarged European Union. Country Report: Bulgaria', p. 46.
259 National Strategy on Migration, Asylum and Integration (2015 – 2020), p. 27. Also in Interview # 1 with official, Bulgaria, July 2016, Annex III.
260 National Strategy on Migration, Asylum and Integration (2015 – 2020), p. 27.
261 Interview # 1 with official, Bulgaria, July 2016, Annex III.
262 Interview # 1 with official, Bulgaria, July 2016, Annex.

and from complying with the 10 % requirement with regards to ICT applicants (Article 31, (2) of the ALMLM).[263] If the duration of the employment contract is less than one year, the permit will be issued for the duration of the employment contract (Article 33п, Para 2 and 3 of the AF).

Third-country nationals can work in Bulgaria on the basis of a continuous residence permit for an intra-corporate transfer for a period of up to: three years for employees who are managers and specialists and one year for trainee employees (Article 32, Para 2 of the ALMLM). The working conditions for these workers are to be settled under the terms and conditions for posted or sent workers in the framework of provision of services on the territory of Bulgaria.

Researchers' Directive[264]

In line with Article 24б, Para 1 of the AF, researchers are entitled to receive a continuous residence permit in cases where they have obtained a visa under Article 15, Para 1 and have a hosting agreement for the development of a "scientific research project" with a "scientific research organization" which has its seat in Bulgaria, and which has been entered on to the national list of scientific research organisations in accordance with Directive 2005/71/EC. In order to be granted a continuous residence permit, researchers need to meet the requirements stipulated by Article 24, Para 2 of the AF, such as having secured accommodation, obligatory health insurance and social insurance and sufficient living funds for the duration of their stay.

This permit is granted for a period of one year and is subject to renewal when there are grounds for its extension (Article 24б, Para 2 of the AF). In case the term of development of the scientific research project is less than one year, the residence permit is granted for the duration of the project. Foreigners are required to first submit a residence permit application and then register with the Employment Agency through the host research organisation.[265] Third-country nationals who are admitted as researchers for the purposes of conducting a research project

263 The supporting documents that needs to be submitted as part of the application are stipulated in Article 23 of the Implementing Regulation of the ALMLM.

264 This chapter focuses on Directive 2005/71/EC of 12 October 2005, since Directive (EU) 2016/801 was awaiting transposition at the time of writing of this study. Directive (EU) 2016/801 was transposed in ALMLM with the latest amendments from 16 March 2018 (SG No 24/ 16 March 2018, which enter into force on 23 May 2018).

265 The supporting documents that needs to be submitted as part of the continuous permit application are stipulated in Article 24b, Para 3 of the AF.The supporting documents that need to be submitted for the registration with the Employment Agency are stipulated in Article 33 of the Implementing Regulation of the ALMLM.

under a research agreement with a hosting research organisation in Bulgaria are exempt from the requirement to possess a work permit for the duration of their project (Article 36, Para 1 of the ALMLM).

EU Long-term Residence Directive

In line with the research design of this study, the provisions of the Long-term Residence Directive which allow individuals to be absent from the territory of the country are presented in this section. As was already mentioned earlier, the European Commission planned to use these provisions as an instrument that could facilitate circular migration.[266]

Article 40 Para 1 (6) of the AF stipulates that a foreigner loses his/her long-term residence permit or national permanent residence where they are absent from the territory of Bulgaria for 12 consecutive months, unless he or she has a permit based on one of the investment grounds that is contained in Article 25 of the AF. Similar to what is provided in Polish law, according to Article 40, Para 4 of the AF, the permit will also be revoked in cases where the individual is absent from the territory of Bulgaria for a total period of six years. In line with Article 40, Para 1 (11) of the AF, a former Blue Card holder who has obtained an EU long-term residence permit will have it revoked when the holder has left the territory of Bulgaria for a period longer than six years or the territory of the EU for a period of 24 consecutive months.[267]

7.5.2.3. Relevant instruments without explicit reference to circular migration

Single Permit Directive

The Act on Foreigners introduced a new type of "single residence and work permit" in order to transpose the Single Permit Directive. Foreigners may be granted continuous residence and a work permit of this kind when they meet the requirements for access to the labour market under the ALMLM and if they have a national long-term visa with a validity of up to six months (Article 24и of the AF). The single permit for workers is issued on the basis of the general work authorisation procedure that is stipulated in Article 7 (1) of ALMLM described above. It is issued with a maximum validity of one year only and the overall duration of the

266 See Chapter 4, section 4.3.2. for more details.
267 For the grounds of revocation, see Article 133 in conjunction with Article 101 of the AF.

work authorisation can be prolonged by up to three years if the circumstances for its issuance have not changed (Article 15 (3) of the ALMLM).

Those who are exempted from the labour market test and the ten per cent requirement (Article 7, Para 1 (1) and (2) of the ALMLM) are, amongst others, foreigners of Bulgarian origin who have been certified according to the procedure contained in the Act for the Bulgarians Living outside of the Republic of Bulgaria, and have suitable professional qualifications and experience, until they are granted a permanent residence permit; foreigners whose employment is a result of the implementation of an international treaty (such as bilateral agreements for temporary employment); guest-lecturers, teachers, athletes and coaches under specific conditions (Article 15 (4) of the ALMLM).

An employer who wishes to apply for extension of a single permit is required to perform another labour market test and to list the reasons why he or she has not trained another Bulgarian citizen who could possibly take the position in question (Article 14 (3) of the Implementing Regulation of the ALMLM). The ALMLM does not contain any provision in this regard, which means that the implementing regulation introduces more restrictions than the general legal act, which is contrary to what is provided in the Act on Legal Acts.

7.6. Entry and re-entry conditions – implementation dynamics

7.6.1. National instruments

During the recruitment process for the focus groups in Bulgaria, it turned out be challenging to find migrant workers who were employed on labour contracts. The reason behind this was due to the restrictive entry conditions that were dependent on the performance of a labour market test as a requirement to obtain a work permit. In the past ten years, an average of 880 work permits have been issued per year and an average of 317 have been extended per year (see Graph 7.1). From the beginning of 2013 until September 2017, 800 single permits for work and residence were issued.[268]

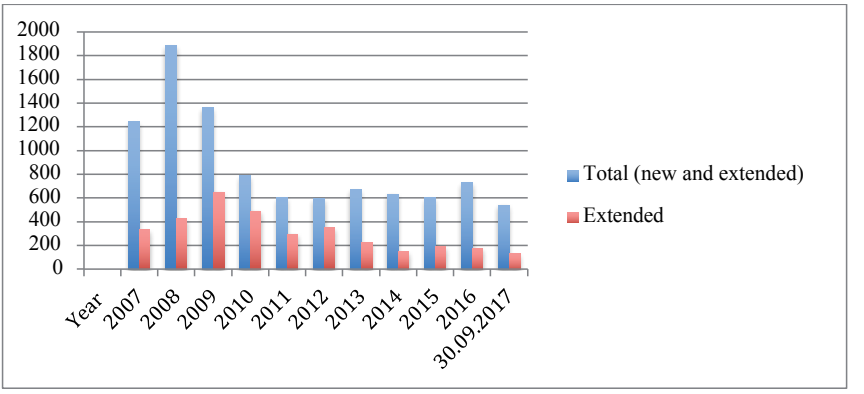
268 Data requested and obtained from the Ministry of Interiors in October 2017.

According to one of the interviewed lawyers, the labour market test made the migrants dependent on the employer and this created a breeding ground for corruption. Furthermore, it was remarked that:

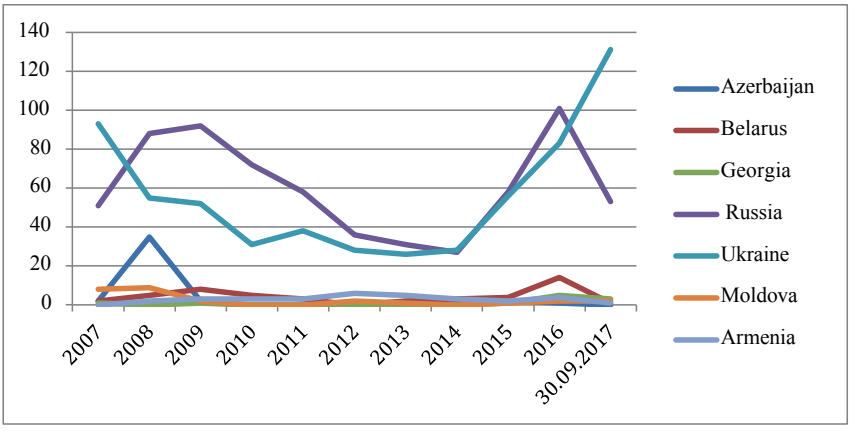
> "[t]hey need to find someone to do this test for them. This test is a formality, does not prove anything and it leaves discretion in the hands of the administration that can refuse to issue a permit. Who is going to fight for you? You need to be exceptional for the employer to be willing to go through all this".[269]

One of the interviewed employers mentioned that he wished to employ Russian-speaking foreigners, however, the respondent stressed that this was very difficult and that there were many hurdles that impeded migrants from obtaining the necessary visa D.[270] The respondent explained that she would like to hire a cook but it would be very difficult to obtain a visa for such person just because it is an ordinary job. One of the interviewed lawyers also commented on that same requirement, saying that it was very hard to prove that a migrant was "unique", e.g., the cook needed to be hired to work in an "exotic" restaurant in order to be able to pass the labour market test.[271] Therefore, the interviewed employer preferred to hire migrants that were already in the country: "I cannot imagine how much money, time and nerves I would need to waste in order to obtain a visa D for a foreigner I want to hire!".[272]

269 Interview # 9 with lawyer, Bulgaria, July 2016, Annex III. Also in focus group with Russian migrants, Bulgaria, September 2016, Annex IV.
270 Intreview # 19 with foreign employer, Bulgaria, September 2016, Annex III.
271 Interview # 8 with lawyer, Bulgaria, July 2016, Annex III.
272 Intreview # 19 with foreign employer, Bulgaria, September 2016, Annex III.



Graph 7.1. Total number of issued and extended work permits/labour market authorisations in Bulgaria per year in the period 2007- September 2017. Source: Employment agency.[273]



Graph 7.2. Number of issued and extended work permits/labour market authorisations to workers coming from the Eastern partnership countries and Russia to Bulgaria in the period 2007- September 2017. Source: Employment agency.[274]

The interviewed state officials, on the other hand, stated that the test was a requirement that aimed to protect the labour market and to "keep the Bulgarians

273 The data was requested and received in October 2017.

274 The data was requested and received in October 2017. Apart from Ukraine and Russia, the U.S., Serbia, Macedonia and Turkey also stand out as main countries of origin for workers who obtained work permits.

with high qualifications here".[275] In line with this policy, the fee that the employer was required to pay for a work permit was set purposefully high in comparison to the level of other administrative documents for Bulgarians, because it aimed to protect the market. According to them, the foreigners were supposed to come on a temporary basis in order to train Bulgarian workers. The aim of the three-year period of validity of the work permit was to allow Bulgarians to qualify and get the position in question.

These impediments forced most of the foreigners to resort to different channels so as to circumvent the entry procedure.[276] According to the interviewed migrants, due to the very restrictive access to the Bulgarian labour market and the labour market test requirement, most of the foreigners entered Bulgaria through the registration of a trade representation and then sought employment (Article 24 (1) 6 of the AF).[277] The trade representation was used only as a ground of entry, on the basis of which a residence permit was issued but it did not give the individual the right to work (Article 8 (1) 2 of the ALMLM). After entering the country, many of the migrants registered a Bulgarian company, so that they could exercise an economic activity (as managers). However, this did not give them access to the labour market as employees. The alternative ground of entry contained in the Act on Foreigners required the foreigner to register a firm as well as to provide ten working places for Bulgarians, which according to the interviewed migrants and other respondents was impossible for a small and fledgling business to adhere to.[278]

An alternative option for migrant workers was to use a multi-entry visa C to undertake short periods of work in Bulgaria and then subsequently receive their remuneration in their country of origin. However, the Ukrainian respondents in the focus group shared that this was neither good for their family, nor for their business. Well-off Russians often used the grounds contained in Article 25 of the AF and invested in Bulgarian property of a value of 500 000 EUR, which gave them the opportunity to directly obtain permanent residence and secure housing. The permit also allowed them access to the labour market. Even Russian pensioners, who had bought a flat that was not as expensive so as to be considered as an investment, still needed to obtain a visa. In order to circumvent the law and obtain a residence permit, they registered a trade representation, so that they could

275 Interview # 10 with officials, Bulgaria, July 2016, Annex III.
276 Interviews # 8 and # 9 with lawyers, Bulgaria, July 2016, Annex III; Focus groups with Russian and Ukrainian migrants, Bulgaria, September 2016, Annex IV.
277 Focus groups with Russian and Ukrainian migrants, Bulgaria, September 2016, Annex IV.
278 Interview # 18 with representatives of an IT company, Bulgaria, September 2016, Annex III.

circulate freely and with minimal expense.[279] One of the participants in the focus groups added: "Another entry option is to get married".

The interviewed migrants in the focus groups described the reality as forced circulation. For the majority of them, being granted a long-term residence status was the desired option, rather than engaging in circular migration. Bulgarian migration law is based on the premise that in order to change one's status (from visa C to D) or to renew one's permit, a person needs to leave Bulgaria and re-apply from another country.[280] According to one of the interviewed lawyers, this was a result of the logic of the law that "[t]he foreigner must suffer".[281] The Russian participants in one of the focus groups shared that "When you need to go out to change your visa from C to D and pay so much, you do not want to circulate".

According to the provisions of the ALMLM, the worker can stay in Bulgaria for a maximum period of three years before he/she needs to leave and re-apply again from abroad, which means that a labour market test will have to be performed again. According to officials, there are only a few cases of individuals who re-applied.[282] Another interviewee said:

> "If sent back home after 3 years, the migrant is discouraged to come back! Everyone looses. Re-entry is not guaranteed. You can be refused visa D, which means a waste of time, money and opportunities. Who would risk coming back if he/she can go somewhere else?"[283]

The Russians that were trying to reach the five-year threshold in order to obtain long-term residence shared that they paid 350 EUR per year per person in order to renew their residence permit and their ID card,[284] and that voluntary "circular migration would be a big risk".[285]

279 Focus groups with Russian and Ukrainian migrants, Bulgaria, September 2016, Annex IV.
280 See also European Migration Network, 'EMN Focussed Study 2015: Changes in immigration status and purpose of stay: an overview of Bulgarian approaches.', (2015).
281 Interview # 8 with lawyer, Bulgaria, July 2016, Annex III.
282 Interview # 10 with officials, Bulgaria, July 2016, Annex III.
283 Interview # 9 with lawyer, Bulgaria, July 2016, Annex III.
284 This has been reduced as a result of the amendments to Article 10 of Tariff No. 4.
285 Focus groups with Russian migrants, Bulgaria, September 2016, Annex IV.

7.6.2. EU instruments

Blue Card Directive

The Bulgarian administration issued 564 Blue Card permits between January 2011 and September 2017.[286] Most of the permits were issued to chief executives and managers, followed by IT specialists and engineers. Most of the Blue Card permits were granted to third-country nationals coming from Ukraine (164 permits) and Russia (157 permits) followed by China (35 permits), Macedonia (33 permits) and Serbia (27 permits).[287]

The focus groups in Bulgaria, as in Poland, mainly included participants who were supported by the IT companies' relocation manager in the application process for the Blue Card permit. In Bulgaria, the application process took seven to eight months initially to complete and at the time of the field research in September 2016 it lasted on average five to six months.[288] All of the foreigners that were interviewed had to apply for work authorisation while they were still in their country of origin and then for a visa on the basis of the obtained decision for work authorisation. In order to apply for a visa, they needed to present the work authorisation decision and evidence of possessing health insurance, but it was reported that the consuls often also required a rental contract – a requirement that Blue Card applicants are exempt from. The relocation manager had to call the embassies and explain to them what the legal provisions were for this group of migrant workers, including that the deadline for issuing a visa D for Blue Card holders was 15 working days.[289] This period was not respected in practice and the issuance of visa took up to 30 days. This caused delays in the already lengthy application process.

After they arrived in Bulgaria, they had to first find an apartment because they needed a rental contract in order to be able to apply for the Blue Card permit.[290] During this period, which could take up to one month, they could not be officially employed and work because they had to register their personal number that was printed on the Blue Card in the National Revenue Agency. Only afterwards could

286 The data refers to the number of permits and not to permit holders, which means that there could be more than one permit per person. The data was obtained from the Ministry of Interior. It was requested in September 2017 and received in October 2017.
287 The data was obtained from the Ministry of Interior. It was requested in September 2017 and received in October 2017.
288 Focus group with Blue Card holders from Ukraine and Russia, Bulgaria, September 2016, Annex IV.
289 Interview # 18 with representatives of an IT company, Bulgaria, September 2016, Annex III.
290 Focus group with Blue Card holders from Russia, Bulgaria, September 2016, Annex IV.

the employer register the employment contract in the same agency and only at this point was the Blue Card holder able to start working.

The main problems that were raised by the respondents with regards to the application procedure in both Bulgaria and Poland related to the condition to prove that the foreigner possessed a higher professional qualification, either through the completion of at least a three-year course of study at a higher education institution or through five years of professional experience in a field that is compatible with the profession. Currently, and in violation of the directive, applicants in Bulgaria are required to present both types of documents – diplomas and proof of professional experience. In addition, the provisions of the ALMLM do not specify how many years of experience are required and whether they need to be acquired while at the same position, which creates problems for the applicants and leaves a great deal of discretion in the hands of the administration.[291]

The representatives of the IT business that were interviewed also stressed that the labour market test that they had to perform in order to be able to recruit Blue Card holders was "absolute deception".[292] According to them, it was redundant and a formal procedure that always ended with a negative result and which lead to recruitment of a third country candidate who had already been selected. They also said that the Labour offices officials supported them throughout this procedure because they also knew that the Bulgarian labour market lacked these types of specialists and there were no other candidates that they could offer to the IT business.[293]

When asked whether they had returned to their countries of origin for work, the respondents in Bulgaria that answered in the affirmative, said that they did so mainly through the internal "home office" system that the company offered through its network of branches in the region or they simply went on business trips.[294] This type of circulation did not create any problems in relation to visas and taxation. The interviewed Russians in Bulgaria, as well as in Poland, were not interested in going back to Russia, mainly due to political reasons.[295] Some of them shared that they were afraid for their security and some of them stated that they might get into trouble because of the applicable Russian laws on currency and tax. The Russian respondents also shared that it did not make much sense for

291 Interview # 20 with representatives of an IT company, Bulgaria, December 2016, Annex III.
292 Interview # 18 with representatives of an IT company, Bulgaria, September 2016, Annex III.
293 Interview # 18 with representatives of an IT company, Bulgaria, September 2016, Annex III.
294 Focus group with Blue Card holders from Ukraine, Bulgaria, September 2016, Annex IV.
295 Focus group with Blue Card holders from Russia, Bulgaria, September 2016, Annex IV.

them to go back home for work because their labour contracts and permits were only for one year and subject to renewal.

Seasonal Workers' Directive

The study's research design envisaged initially also focus groups with seasonal workers in the tourism sector. However, during the recruitment phase in the summer of 2016, the research informants shared that these migrants were entering on a tourist visa and, in general, they were working irregularly. Tourism industry representatives later confirmed this information, which posed challenges with regards to the ethical standards employed by the study, which leaves irregular migrants outside the scope of this research. Furthermore, the transposition of the Seasonal Workers' Directive allegedly did not lead to regularisation of this type of work in the 2016/2017 winter season. Numerous media outlets reported that the Labour Inspectorate had found that Ukrainian and Moldovan workers were coming to Bulgaria as trainees under signed agreements for exchange between professional schools in the Eastern Partnership countries and tourist companies in Bulgaria. Nevertheless, in reality they were working full–time and receiving salaries without having proper labour contracts.[296]

According to the data published by the Employment Agency, between 1 January and 6 October 2017, 3263 third-country nationals were registered in Bulgaria for the purposes of exercising seasonal work for up to 90 days (in line with Article 24л of the AF).[297] Most of them came from Ukraine (2702), followed by Moldova (134) and Russia (54). In the same period, only two permits were issued to third-country nationals that were willing to exercise seasonal work for up to nine months (in line with Article 24к of the AF). [298]

To compensate for this empirical gap and to provide more information on the implementation of the directive in Bulgaria, three additional interviews with a representative of an employers' organisation in the Bulgarian tourism sector were

296 Offnews, The procedure for recruitement of seasonal workers have been eased (Улесниха процедурата за наемане на сезонни работници от чужбина), retrieved at https://offnews.bg/turizam/ulesniha-protcedurata-za-naemane-na-sezonni-rabotnitci-ot-chuzhbina-658341.html (accessed 11 October 2017); Dnevnik (Дневник), Hotels and restaurants camouflage the hiring of foreigners with training contracts (Хотели и ресторанти замаскират наемането на чужденци с договори за обучение), retrieved at http://www.dnevnik.bg/biznes/turizam/2017/03/10/2932528_hoteli_i_restoranti_zamaskirat_naemaneto_na_chujdenci/ (accessed 11 October 2017).

297 Data obtained from the Employment Agency in October 2017.

298 Data obtained from the Employment Agency and the Minisry of Interior in October 2017.

conducted in January and October 2017, and one with a recruiter in October 2017.[299] The representative of the employers' organisation that was interviewed stressed that Bulgaria did need seasonal workers from third countries, because Bulgarians who used to work in this sector had left for other Member States. In January 2017, the interviewee said that he appreciated the measure of "lifting of the restrictions" for hiring third-country nationals but he complained that the developed procedure under the ALMLM was cumbersome and was designed to purposefully create obstacles for the recruitment of migrant workers.[300]

The interviewee expressed his dissatisfaction with the provisions that were adopted and which stipulated two different procedures for seasonal work: up to 90 days and between 90 days and nine months in line with the Seasonal Workers' Directive. He said that the authorisation of 90 days was insufficient for the needs of the tourism industry because employers needed time to train the workers and wanted them to stay during the whole summer season, which is six months. However, the procedure concerning seasonal work permits for up to nine months was too expensive given the number of workers that the hotels had to recruit: up to 400 EUR per person for the visa and work permit application,[301] compared to 35 EUR for workers coming for up to 90 days[302] and even less after the visa liberalisation with Ukraine came into force.[303] The respondent claimed that the Black Sea resort alone, where his business operated, needed 15 000 workers and that it was impossible to afford the expenses that were related to seasonal work permits.

Therefore, according to the follow-up interviews and the obtained data, the tourism sector primarily hired students from Ukraine and Moldova because it was cheaper in comparison to other countries due to the visa conditions and the geographical proximity.[304] They worked for 90 days and were replaced thereafter by a second wave of seasonal workers who were hired for 90 days in order to cover the rest of

299 Interview # 11 with representative of an employers' organisation in the tourism sector, Bulgaria, January 2017, Annex III.
300 Interview # 11 with representative of an employers' organisation in the tourism sector, Bulgaria, January 2017, Annex III.
301 Interview # 22 with representative of an employers' organisation in the tourism sector, Bulgaria, October 2017, Annex III.
302 Interview # 11 with representative of an employers' organisation in the tourism sector, Bulgaria, January 2017, Annex III.
303 Interview # 22 with representative of an employers' organisation in the tourism sector, Bulgaria, October 2017, Annex III.
304 Interview # 22 with representative of an employers' organisation in the tourism sector, Bulgaria, October 2017, Annex III.

the summer season.[305] The recruiter that was interviewed in October 2017 stressed that the cumbersome procedure for hiring seasonal workers, which caused delays at the beginning of the summer season, was improved following the amendments to the Implementing Regulation of the ALMLM from 16 June 2017. The amendments were engendered as a result of letters sent by different stakeholders to the administration.

The persisting problems were related to the required documents for the application for seasonal work permits for up to nine months. These documents had to be legalised, which further added to the expenses that employers incurred in order to hire such workers. Another problem was posed by the requirement to demonstrate experience, even for starting positions, such as an assistant cook, which was impossible in the majority of cases. In addition, according to the interviewee, it "makes nonsense" to require from workers to apply for work permits when they are outside Bulgaria.[306]

Intra-corporate Transferees' Directive

Total of 8 ICT permits were issued in Bulgaria since the transposition of the directive in January 2016 until the end of September 2017.[307] As a result of the interviews that were conducted with representatives of the IT sector, it became clear that the ICT Directive did not suit their business needs and they had decided not to use this option at the present time.[308] Furthermore, they changed the permits of all ICT holders to Blue Card permits, where this was possible. Therefore it turned out to be impossible to include holders of this type of permit in the planned focus groups with highly-skilled workers with Blue Card permits. However, the two interviews with representatives from the IT sector – one before the adoption of the Implementing Regulation of the ALMLM and one after – shed light on the challenges that were faced in relation to the implementation of this instrument.

The interviewees shared that they used this procedure when they started to develop the company a few years ago, but they remarked that it "turned out ineffective" due to the transfer extension conditions after the authorised three-year period

305 Interview # 22 with representative of an employers' organisation in the tourism sector, Bulgaria, October 2017. Interview # 23 with seasonal workers recruiter in the tourism sector, Bulgaria, October 2017, Annex III.

306 Interview # 23 with seasonal workers recruiter in the tourism sector, Bulgaria, October 2017, Annex III.

307 Data obtained from the Ministry of Interior in October 2017.

308 Interview # 18 with representatives of an IT company, Bulgaria, September 2016, Annex III.

under the directive had elapsed.[309] The fact that the worker needed to wait for six months before he or she could re-apply for such transfer rendered this procedure ineffective for the IT business. Initially, when the directive was transposed into Bulgarian legislation, the waiting period was three months.[310] The interviewees shared that this requirement not only interrupted the company's business and economic activities, but also the private lives of their employees:

> "These people rent flats, buy mobile phones, buy cars, there are also procedures (...) Most of them are with their families, the children go to school and after the 3-year period not only the person but also his family must also leave the territory of Bulgaria and this child, being in school during the school year, should just leave and spend the remaining 9 months in another school in his country".[311]

The requirement for work experience of up to one year in the main company, from which the worker is transferred, also posed certain challenges. In addition, the longer deadlines for the issuance of visas and work permits - 30 working days compared to 15 working days within the Blue Card procedure - was considered to be unpractical.[312] Finally, there was another "legal nonsense" that discouraged the company from using this instrument:

> "If a work authorisation is issued for instance on 1st of March, it becomes effective on 1st of March, the day of its issue. The applicant must submit application for D-type visa with this work authorisation in the Bulgarian embassy in the country where he resides. The administrative period for issuing such a visa, which is for inter-corporate transfer, is 30 working days. You can calculate by yourself, that it is about two months or 45 calendar days. But at this point, while I am waiting for this visa (and I will just add that they are never ready on time, so it generally takes about two months), the worker's work authorisation is elapsing and he has no right to be in the country. He is waiting for his visa in his country, he has no right to come, but his work authorisation has been issued and it needs to be issued as a required document in order to apply for a visa. This is a legal nonsense! As soon as this person receives his visa and has the right to come to the country legally, two months from his work authorisation has

309 Interview # 18 with representatives of an IT company, Bulgaria, September 2016, Annex III.
310 Interview # 20 with representatives of an IT company, Bulgaria, December 2016, Annex III.
311 Interview # 18 with representatives of an IT company, Bulgaria, September 2016, Annex III.
312 Interview # 20 with representatives of an IT company, Bulgaria, December 2016, Annex III.

> already expired (…). It is issued for one year, but when he comes here, he works only ten months, because in reality he was waiting for two months for a visa while there was an active working permit during that time. This is another signal to us that this procedure is not practical for us".[313]

Researchers' Directive

The targeted efforts to find researchers who came to Bulgaria under a host agreement in line with the Researchers' Directive during the focus groups' recruitment process did not succeed. Several researchers from the Eastern Partnership countries were identified but they were benefitting from bilateral agreements that were signed for the exchange of lecturers between Bulgaria and these countries. This is not surprising if one takes a look at the available data. For a period of more than ten years, only 33 permits have been issued to researchers in line with Article 24б of the AF.[314] Interestingly enough, according to data that was obtained from the Employment Agency, there have been no third-country nationals that have been registered with the Agency for the development of a "scientific research project" in the same period (see the requirements above in section 7.5.2.2.).[315] This could mean that host institutions are violating the requirements of the ALMLM or that the issued residence permits are based on other bilateral measures, as the research informants pointed out.

One of the interviewed officials shared that there were problems as a result of foreigners coming to Bulgaria on a scientific exchange programme as per Article 15, Para 2 of the Act on Foreigners.[316] This article provides for the issuance of a long-term visa with a validity of one year and which falls outside the scope of the Researchers' Directive. According to data obtained from the Ministry of Foreign Affairs, only 36 such visas were issued for the period January 2007-September 2017.[317] Again, it is unclear whether this instrument is used only for researchers coming under national measures or whether it also covers cases under the directive, which would constitute a violation of the directive because Member States are only required to issue residence permits.[318] The use of this article

313 Interview # 18 with representatives of an IT company, Bulgaria, September 2016, Annex III.
314 Data obtained from the Ministry of Interior in October 2017. The number concerns permits, which means that one person could have more than one permit.
315 Data obtained from the Employment Agency in October 2017.
316 Interview # 2 with state official, Bulgaria, July, 2016, Annex III.
317 Data obtained from the Ministry of Foreign Affairs in October 2017.
318 The directive allowed for a transition period under Article 18, where Member States were not obliged to issue residence permits. However, this period has since expired. See also S. Peers, 'Admission of Researchers', in S. Peers et al. (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 2: EU Immigration Law*, p. 138.

created problems with regards to the lack of legal possibilities to issue a personal number to a foreigner, which was required by the Ministry of Education, other public institutions, as well as private companies, such as mobile phone operators.[319] According to the interviewed official: "In such cases, after many reservations and making a compromise, we issue a visa under Article 15, Para 1 and we grant the person a permit for continuous residence, because the lack of personal number of a foreigner does not allow for normal life in Bulgaria".[320] In any case, the gathered data suggests that the implementation of the Researchers' Directive in Bulgaria is marginal.

EU Long-term Residence Directive

Between 2007 and 2017, 653 third-country nationals have obtained EU long-term residence permits (on the basis of Article 24г, Para 1 of the AF), and 31 025 permanent residence permits have been issued in line with Article 25, Para 1 of the AF.[321] For the same period, 3834 permanent residence permits were revoked due to absence from the territory of the Member States (on the basis of Article 40, Para 1 (1) of the AF). There have not been any revoked EU long-term residence permits in the same period (on the basis of Article 40, Para 1 (11) of the AF), which supports the data gathered from the focus groups suggesting that migrant workers in Bulgaria are interested in achieving a secure status and are not in voluntary circular migration due to risks of losing their permits.

In Bulgaria, none of the interviewed EU long-term residence or national permanent residence permit holders were interested in circulation for work. In addition, none of the Blue Card holders in Bulgaria had stayed for more than five years to become eligible to apply for a long-term residence permit. However, judging by their attitudes toward their countries of origin, they were not planning to engage in work-related circulation outside the possibilities for business or "home office" trips.

7.7. Assessment

Contrary to Poland, Bulgaria currently does not provide so many targeted national measures for facilitated entry for the citizens of the Eastern Partnership countries. They, however, can benefit from the developed EU visa facilitation instruments,

319 Interview # 2 with state official, Bulgaria, July, 2016, Annex III.
320 Interview # 2 with state official, Bulgaria, July, 2016, Annex III.
321 Data obtained from the Ministry of Interior in October 2017.

visa free regimes and the outsourced Visa Application Centres. Furthermore, citizens of the Eastern Partnership can make use of the policy measures towards foreigners of Bulgarian origin, which provides for a possible work permit exemption, facilitated access to permanent residence and a fast-track citizenship procedure in case they decide to apply for Bulgarian citizenship on the basis of their Bulgarian ethnic origin.

Bulgaria follows its pre-accession "catch-up and imitation" model and it has created restrictive national legislation, which in turn triggers various circumvention practices that were described by the migrants. The transposition of EU labour migration law also follows this restrictive entry policy line, which in many cases renders the possibilities created by the EU norms ineffective. The empirical data on the implementation of the different instruments shows that the Bulgarian politicians and administration are generally not accommodating the realities of the labour market and the needs of the business, which necessitates the need to employ a foreign labour force. Only recently, and under the pressure that has been exerted for more than two years by the IT companies in Bulgaria, have entry conditions for Blue Card holders been slightly liberalised and subsequently several positions in the IT sector have been exempted from the performance of a labour market test.[322] By way of contrast, the conditions for recruiting seasonal workers has been liberalised, but this only partially addresses the demands and the needs of the tourism industry. The ALMLM provides for a facilitated re-entry for seasonal workers who have already worked in Bulgaria, but it is too early to assess whether this provision will lead to circular movements in the future.

The restrictive entry policies in Bulgaria trigger what can be referred to as "forced circularity", which aims to keep migrants in a temporary position. This conclusion is also supported by the current governmental plans to start negotiations for concluding bilateral agreements for temporary employment. It remains to be seen whether Blue Card holders will also "fall victim" to the forced circulation rules for renewal of their permits.[323] This policy is not considered to be in line with the study's benchmarks because it does not allow for migrant-led trajectories and does not allow for protection of migrant workers' rights.

Because migrants invest many resources and expend great effort to enter the country and stay there, they perceive voluntary circulation as being too risky and their main goal is to obtain EU long-term residence. Blue Card permit holders are

322 Subject to change due to the recent amendments of ALMLM. See above.
323 According to the latest ALMLM amendments, this is not the case now. See above.

an exception in this regard because they use their internal "home office" mechanisms to circulate back and forth. Outside of this practice however, they are not interested in going back to their countries of origin for work.

Like in the Polish case, long-term residence permits do not seem to be an attractive tool for circulation for settled migrants in Bulgaria. The few interviewed migrants that had national or EU permits used them to maintain their transnational links with their country of origin, but they did not consider this to be work-related circulation. Even the Blue Card holders who can benefit from flexibility in this regard did not demonstrate any real interest in circulating, mainly because of political and economic reasons.

7.8. Work authorisation – instruments at the EU and national level

7.8.1. National instruments

General framework

The ALMLM states, in Article 7, Para 2 thereof, that workers who are third-country nationals and who have been granted labour market access can be employed only by a natural or legal person in a place, at a position and for a duration matching the ones that are specified in the granted work authorisation. The right to access the labour market can be withdrawn, if the Executive Agency "General Labour Inspectorate" establishes that the third-country national's employment does not match the one specified in the granted work authorisation in line with Article 7, Para 3 (Article 12, Para 1 (2) of the ALMLM). The ALMLM does not provide for a general provision on the possibility to access all types of employment and change of occupations subject to a maximum restriction, apart from the options derived from the specific permits based on the EU labour migration directives and the permanent residence status.

Upon the premature termination of an employment relationship with a third-country national, the employer is obliged to notify the Employment Agency in writing within three days from the date of termination of the employment (Article 10, Para 4). In such cases, an application for a new labour market access authorisation can be submitted after a three-month interruption between the expiry of a third-country national's permit and the request for a new starting period of employment (Article 7 (1) of the Implementing Regulation of the ALMLM). Here again, whether the loss or termination of employment would lead to a withdrawal

of migrant's work authorisation or there would be a possibility to find alternative work, is dependent on the different types of permits that have been introduced through EU law.

Bilateral framework agreement regarding recruitment and temporary employment

The only explicit provision that is contained in the bilateral agreement concerning the standards on work authorisation employed by this study is that temporary workers are not entitled to perform any other remunerated activities or to be employed in relation to any other economic activity other than the ones for which they were granted a visa and work permit in the host country (Article 1, Para 4). The remaining issues relate to the change of employer and the possibility to find alternative employment, and these are subject to the national law of the contracting parties.

7.8.2. EU instruments

Blue Card Directive

During the first two years of their employment, the Blue Card holders may only change their employer after obtaining a written positive decision that has been issued by the Employment Agency (Article 20, Para 2 of the ALMLM). According to the Implementing Regulation of the ALMLM, the procedure for granting the above-mentioned decision is carried out in line with the criteria contained in Article 15, which outlines the initial Blue Card application process. This means that if the position is not among one of the positions that is exempted from a labour market test, the new employer must perform a new labour market test in line with Article 8, Para 1 of the directive.[324]

In the event that the Blue Card holders become unemployed, they are entitled to a period of three months to look for new employment and start working in line with the initial application procedure (Article 21, Para 1 of the ALMLM). The Employment Agency cannot propose withdrawing the Blue Card permit within this period (Article 21, Para 3 of the ALMLM). The right to look for a new employer can only be used once within the period of validity of the Blue Card (Article 21, Para 4 of the ALMLM).

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324 According to the latest ALMLM amendments, all Blue Card holders are exempt from labour market test. See above.

Seasonal Workers' Directive

According to the Act on Foreigners, the permit for a seasonal worker can be extended once within the respective authorised period of stay – not less than 90 days and not more than nine months – upon a decision by the Employment Agency (Article 24κ, Para 2 of the AF). In such cases, seasonal workers are entitled to extend their permit or renew it by changing their employer (Article 29 of the ALMLM). They have the right to continue to reside in Bulgaria until a decision on the application is made, provided that the application was submitted within the period of validity of the permit and the authorised period of stay has not expired (Article 24k, Para 7 of the AF).

An opportunity to seek employment in an area other than seasonal work, for which the permit is granted, is not explicitly regulated in the provisions of the ALMLM.

Intra-corporate Transferees' Directive

In line with the ICT Directive, the relevant Bulgarian legislation does not legislate for change of employer or sector: the ICT permit entitles a third-country national to work on the territory of the Republic of Bulgaria for a specific receiving enterprise or group of enterprises only and solely for the position of a manager, a specialist or a trainee employee (Article 31, Para 3 of the ALMLM). Thus, ICTs cannot change their employer and occupation within the period of validity of the ICT.

Furthermore, the working conditions for third-country workers with an intra-corporate transfer permit are regulated under the terms and conditions for posted or sent workers within the framework of provision of services on the territory of the Republic of Bulgaria (Article 32, Para 1 of the ALMLM). In accordance with the Bulgarian Labour Code, the sending of employees within the context of the provision of services occurs, *inter alia*, when: an undertaking employing a worker that is temporarily registered under the legislation of a third country sends a worker to an undertaking in the territory of Bulgaria (Article 121a, Para 2 (2) of the Labour Code). An employee may be posted or sent, where for the entire period of secondment/sending or posting, there is an employment relationship between the latter and the seconding or sending employer, which is one of the conditions for obtaining an ICT permit (Article 121a, Para 3 of the Labour Code and Article 40, Para 4 of the ALMLM in conjunction with Article 25, Para 1 (3) of the Implementing Regulation of the ALMLM).

The receiving enterprise is obliged to notify the Employment Agency of any changes in relation to the conditions for granting the permit (Article 31, Para 4 of the ALMLM). This means that premature termination of the employment relationship with the sending undertaking in the case of ICTs would lead to a withdrawal of the permit because this would affect the admission conditions that are stipulated in Article 31 of the ALMLM and Article 23 of its Implementing Regulation in conjunction with Article 121a of the Labour Code. Therefore, if ICT permit holders wish to look for alternative work, they need to exit the country and then apply for another permit.

Researchers' Directive

Bulgarian migration law does not legislate for the change of hosting organisation for researchers. There are no legal provisions regulating cases of unemployment, which means that when the hosting agreement has been terminated, the permit of the researcher would be withdrawn because the initial circumstances for its granting would have changed.

Single Permit Directive

Following Bulgaria's "copy and paste" approach to EU legislation, the ALMLM is "harmonised" with the Single Permit Directive and it does not contain any explicit rules on the change of employer and it does not provide for a period of time during which the migrant worker can seek alternative employment. What is clear, however, is that any interruption to a worker's employment would be a ground to refuse an extension of the single permit (Article 15, Para 3 of the ALMLM).

7.9. Work authorisation – implementation dynamics

7.9.1. General framework

As was already described in the section on entry and re-entry conditions, according to one of the interviewed lawyers, the labour market test makes migrants dependant on employers and is conducive to corruption.[325] This is due to the fact that changing an employer means repeating the whole application procedure again, including the labour market test for the majority of categories of workers. As one interviewee stressed: "This practically leads to a legal bondage

325 Interview # 9 with lawyer, Bulgaria, July 2016, Annex III.

to a certain employer in 21 century. This is pure feudalism".[326] The interviewed officials confirmed that in the majority of cases, if workers wanted to change their employer, they needed to leave the country and then re-apply following an interruption of one month.[327]

The participants in the focus groups did not mention any problems in relation to changing employers, because most of them stayed in Bulgaria on trade representation grounds and worked for their own companies. One of the participants in the Russian focus groups said that she was hoping to be able to apply for a Blue Card, but when she understood that the directive was transposed in such a way that would require her to apply only when she was outside the country, she decided that this would be too risky because she only had two years left until she would be eligible for a long-term residence permit.[328]

7.9.2. EU instruments

Seasonal Workers' Directive

As was already mentioned, seasonal workers were mainly working irregularly in 2016, which did not allow them to make use of the provisions allowing for the change of employers. One of the interviewed foreign employers, who knew the Russian speaking community well, shared that she was aware of many cases of exploitation, mainly related to violations of the mandatory weekly rest that was provided under the Labour Code.[329]

Blue Card Directive

The majority of the Blue Card holders had arrived relatively recently in Bulgaria and their main problems related to the application process, the renewal of their permits and family reunification. None of them indicated any plans to change their employers.

Intra-corporate Transferees' Directive

According to the interviewed representatives of an IT company, the procedure for transposing the ICT Directive became even more cumbersome after the adoption

326 Interview # 9 with lawyer, Bulgaria, July 2016, Annex III.
327 Interview # 10 with officials, Bulgaria, July 2016, Annex III.
328 Focus group with Blue Card holders from Russia, Bulgaria, September 2016, Annex IV.
329 Intreview #19 with foreign employer, Bulgaria, September 2016, Annex III.

of the Implementing Regulation of the ALMLM.[330] According to their perspective, the ICT transfer was assimilated to a long-term business trip. They remarked that before the adoption of this Implementing Regulation, the procedure provided for the conclusion of a labour contract with the host company, where the workers were transferred and this was the procedure they had followed. This new requirement also raised questions with regard to the possible renewal of this permit after the expiration of the three year period.[331] This insecurity meant that they preferred making use of the other available instruments, such as the Blue Card and the Single Permit Directives.

7.10. Assessment

Unless foreigners are seasonal worker permit holders or Blue Card holders, they cannot change their employer without restarting the whole application procedure again. There are no legal provisions allowing for change of employer and occupation, because the whole logic of Bulgarian migration law is to keep migrants in a temporary position by requiring interruptions and stays abroad when migrants have to change their status in some way. The same observation applies to unemployment, which in most cases leads to the withdrawal of permits. The "copy and paste" approach is evident in this policy area as well. Where the EU directives stipulate provisions on the change of employer and unemployment, they are transposed into Bulgarian law, as in the case of the Seasonal Workers' Directive and the Blue Card Directive. In the rest of the cases, however, because there is no EU law obligation, Bulgarian lawmakers did not find it necessary to create a general clause, which is contrary to the developed standards at the international and European level employed as benchmarks in this study (see Annex V).[332]

330 Interview # 20 with representatives of an IT company, Bulgaria, December 2016, Annex III. The respondents are referring to the amendments that were made to correct the transposition of the Directive into Bulgarian law.

331 Interview # 20 with representatives of an IT company, Bulgaria, December 2016, Annex III.

332 This will change after 23 May 2018 when the latest amendments of ALMLM of 16 March 2018 will enter into force (SG No 24/16 March 2018). The amended Article 8 (3) ALMLM now provides that foreigners from Bulgarian origin will be able to work in Bulgaria without a work authorisation after a registration by the employer in the Employment Agency.

As in the case of Poland, the enforcement of the rights of seasonal workers is problematic.[333] According to the author, the greater involvement of the Executive Agency "General Labour Inspectorate" in line with the ALMLM could have positive role in this regard. However, this would require enhancement of the administrative capacity of this body in long term.[334]

7.11. Residence status – instruments at the EU and national level

7.11.1. National instruments

Permanent residence status

Article 25 of the Act on Foreigners contains provisions on accessing the national permanent residence status.[335] There are several categories of foreigners who can become eligible for this permit such as, *inter alia*, persons of Bulgarian origin,[336] family members of Bulgarian citizens[337] or family members of permanent residence permit holders,[338] investors[339] and foreigners who have resided, legally and continuously, on the territory of the Republic of Bulgaria for the last five years prior to the submission of the application for permanent residence and who have

333 The 2016 report (the report for 2017 is not available) of the Executive Agency "General Labour Inspectorate" stressed that the violations concerning employment of seasonal workers stood out as the major issue after the adoption of the ALMLM. In Executive Agency "General Labour Inspectorate", Activity Report of the General Inspectorate Directorate for 2016, p. 24 May 2017, Sofia, retrieved at: http://www.gli.government.bg/upload/docs/2017-09/Doklad_2016_IA_GIT___ob__odost__pno.pdf (accessed 6 May 2018).

334 According to information of an official from the Executive Agency "General Labour Inspectorate" received in April 2018, after the adoption of the ALMLM its officials underwent trainings aiming at cohesive implementation of the Act. In addition, during the summer and winter seasons, the Agency implements the so-called "campaigns" or targeted inspections in resorts with concentration of seasonal workers. However, in 2016 out of total of 48 053 inspections, only 237 concerned employment of foreigners. In Executive Agency "General Labour Inspectorate", Activity Report of the General Inspectorate Directorate for 2016, p. 3; p. 23 May 2017, Sofia, retrieved at: http://www.gli.government.bg/upload/docs/2017-09/Doklad_2016_IA_GIT___ob__odost__pno.pdf (accessed 6 May 2018).

335 Including also Articles 25 (а- г).

336 See Article 25, Para 1, (1).

337 See Article 25г and Article 25, Para 1 (4).

338 See Article 25, Para 1 (2) and (3).

339 Article 25, Para 1 (6), (7), (8), (13), (16).

not been abroad for more than 30 months during this period.[340] The requirements for obtaining this permit differ depending on which category of person is applying for the status. For the purposes this study, this section focuses only on the most relevant categories.

In line with Article 34, Para 1 of the Implementing Regulation of the AF, applicants for this type of permit need to provide evidence that they have stable, regular, foreseeable and sufficient means of subsistence without resorting to the social assistance system. The amount of the subsistence must be not less than the minimum monthly salary or the minimum pension for the country. Furthermore, they must exhibit proof of accommodation and present criminal record certificate from their country of origin or habitual residence, a copy of their passport and a document which confirms that they have paid the state fee - which amounts to 1000 BGN (500 EUR).[341]

Unlike the facilitated citizenship procedure, foreigners of Bulgarian origin that are applying for permanent residence need to fulfil the conditions that are stipulated in Article 34, Para 1 of the Implementing Regulation of the Act on Foreigners and also present a birth certificate or a certificate of Bulgarian origin that has been issued by the State Agency for Bulgarians Abroad (Article 35 of the Implementing Regulation of the AF).

Foreigners who have resided legally and continuously on the territory of Bulgaria for the previous five years before submitting the application must present the abovementioned documents under Article 34, Para 1 of the Implementing Regulation of the AF. In order to be granted the permanent residence permit, the MoI's Migration Directorate has to check its information databases in order to confirm that the individual has legally and continuously resided in Bulgaria over the last five years (Article 38a of the Implementing Regulation of the AF).

340 According to Article 25a of the AF this permit can also be obtained by foreigners who have contributed to the Republic of Bulgaria in the public and economic sphere, in the sphere of national security, science, technology, culture or sport, without having to fulfill the requirements of the AF. Article 25б of the AF stipulates the possibility to grant this permit to family members of foreigners that have been granted a status under the Asylum and Refugees Act.

341 In accordance with Article 12, Para. 4 of Tariff No 4 on the fees collected in the system of the Ministry of Interior under the State Fees Act.

Bilateral framework agreement regarding recruitment and temporary employment

According to the bilateral agreement with Israel, the temporary employment must be in accordance with "the national law, regulations, rules, procedures and governmental decisions of the receiving state" and at the end of the employment period, the worker is obliged to leave the territory of the receiving state (Article 1). This means that the aim of the agreement is not to allow foreigners to qualify for permanent residence status, because they can only extend their work authorisation for a maximum period of three years, after which they are obliged to leave the country and re-apply for another authorisation.

7.11.2. EU instruments

EU Long-term Residence Directive

Foreigners who have stayed legally and without interruption on the territory of the Republic of Bulgaria for five years are also eligible to apply for the EU long-term residence permit in accordance with Article 24г of the Act on Foreigners. In order to obtain such residence status, the applicants need to present: evidence that they have sufficient means of subsistence for themselves and their family members that is not less than the minimal salary or minimal pension, which would not require recourse to the social assistance system. Furthermore, they must, as a matter of obligation, possess health insurance or insurance for the period of their stay in accordance with the applicable Bulgarian legislation (Article 24г, Para 9 of the AF).

For those who have resided exclusively on the basis of a temporary permit, such as au pairs, seasonal workers, cross-border services providers, posted workers for the purposes of cross border services provision; or where their residence permit is formally limited, they cannot have these periods of residence included in the calculation of the five year period (Article 24г, Para 2 of the AF). EU Blue Card holders can be granted an EU long-term residence status in Bulgaria, if they have resided legally and uninterruptedly for a period of five years on the territory of a Member State as an EU Blue Card holder; two of the five last years must have been on the territory of Bulgaria (Article 33м, Para 1 of the AF).

In accordance with Article 24г, Para 2 of the Act on Foreigners, periods of absence from the territory of Bulgaria do not interrupt the required five year period and can be included in the calculation, if they are less than six consequent months and

do not exceed a total of ten months for the five year period. For Blue Card holders, the five year period is not to be considered interrupted by periods of absence from the territory of Bulgaria, if those periods are less than 12 consecutive months and the total duration does not exceed 18 months within the five year period. These periods of absence have to be necessitated by the exercise of an economic activity as either an employed or self-employed person or due to volunteer activity or for education purposes in the Blue Card holder's country of origin (Article 33м, Para 2 AF).

7.12. Residence status – implementation dynamics

7.12.1. National instruments

As was already stressed in the entry and re-entry conditions section, most of the participants in the general focus groups entered Bulgaria by registering with a trade representation and then seeking employment. Obtaining continuous residence on this ground allowed them to accumulate uninterrupted periods of residence, which would then make them eligible for obtaining permanent or long-term residence. The challenges that they shared in this regard concerned the circumvention practices that they had to use in order to enter the country and stay, and the fact that it was too risky and too expensive to circulate on a voluntary basis, since most of them wanted to stay in Bulgaria in any case.

7.12.2. EU instruments

The implementation of the Single Permit Directive created different challenges for migrant workers, especially in relation to Bulgaria's migration policy focus of keeping migrants in a temporary position. In accordance with Article 15 (3) of the ALMLM, the overall duration of the work authorisation can be prolonged by up to three years if the circumstances for its issue have not changed. After this period, the employee needs to leave the country. As one of the interviewed officials said:

> "Then [after the three year period] he has to leave. (…) Here the legislator for me quite consciously, has foreseen this interruption so that a period for permanent residence cannot be accumulated".[342]

342 Intreview # 2 with official, Bulgaria, July 2016, Annex III.

Indeed, this requirement interrupts the possibility for migrant workers to extend their continuous permanent residence permit for another year, which needs to be submitted within 14 days before the permit is due to expire. Since migrant workers can have work authorisation for only up to three years, they do not have a ground on which they can apply to extend their permit. Furthermore, they cannot change the ground on which they entered Bulgaria from inside the country and in any case they need to leave, if they would like to return to Bulgaria in order to work for the same employer or to enter on a different basis. As was already mentioned, this notion of forced circularity does not allow migrant workers to transfer their status to a permanent one and as a result forces them to undertake circumvention practices in order to find other ways to reside and settle in Bulgaria. Furthermore, as one of the interviewed lawyers said:

> "And by doing all this, by throwing the worker out of here and sending him back to his country of origin, after all these costs he made, let's agree, that he would not come back here again. He will go somewhere where he does not have to do this thing. Not to mention that this demotivates people, because they do not know whether they will get a visa D or not (…) because the chances of not getting it are very big. (…) No worthy specialist with a worthy amount of money will subject himself to these administrative humiliations or obstacles to have the honour of working for Bulgaria".[343]

As was stressed by one of the interviewees, the only privileged group of foreigners in Bulgaria are the Blue Card holders, as they were not required to leave the country after the expiration of their work authorisation period.[344] However, the business representatives that were interviewed stated that they were concerned whether this would be the case in practice because at the time of the interviews they did not have any foreign workers that had reached this three-year threshold.[345] The forced circulation practice of the Bulgarian administration was not in conformity with the company's policy of retaining their employees.

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343 Interview # 9 with lawyer, Bulgaria, July 2016, Annex III.

344 Intreview # 2 with official, Bulgaria, July 2016, Annex III; Interveiw # 20 with officials, Bulgaria, July 2016, Annex III.

345 Interview # 20 with IT business representatives, Bulgaria, December 2016, Annex III.

7.13. Assessment

Migrant workers coming to Bulgaria through the single permit procedure in accordance with the provisions of the Single Permit Directive, as well as the ICT and Seasonal Workers' Directives, are kept in a temporary position and do not have any possibility to accumulate the interrupted five year period that is required as a condition for obtaining either the permanent or long-term residence permit. The only exception in this regard should be the Blue Card holders. However, it is still impossible to assess whether they would have facilitated access in practice because the interviewed Blue Card holders had not reached the end of their three-year authorisation period and at the time of writing of this study. This shows that the Bulgarian legislation is not in line with the international standards in this policy area and which are deployed by the current study as benchmarks, such as Article 2 of the European Convention on Establishment,[346] providing for the facilitation of prolonged and permanent residence status (see Annex V). This restrictive approach of forced circular migration leads to a circumvention of the current labour migration framework and it naturally places migrants in a vulnerable position.

All of the analysed instruments allow for free movement and choice of residence within Bulgaria. The interviewed migrants did not report any problems in this regard.

7.14. Social security coordination – instruments at the national level

Bulgaria has concluded a total of 12 bilateral agreements. As in the case of Poland, two of the agreements were concluded with Eastern Partnership countries - Ukraine and Moldova. In addition, Bulgaria has also signed an agreement with Russia [347] and at the time of the writing of this study, it was negotiating an agreement with Azerbaijan.[348]

The Bulgarian institutions use the Model provisions for a Bilateral Social Security Agreement that is contained in the European Convention on Social Security when

346 The reader should be reminded that this is an aspirational standard only, since Bulgaria is not bound by this instrument and the ICRMW.

347 The rest are with Yugoslavia (currently refers to: Bosnia and Herzegovina and Montenegro), Serbia, Albania, Libya, Turkey, Macedonia, Israel, Korea and Canada.

348 Interview # 4 with official, Bulgaria, July 2016, Annex III.

they are beginning the negotiation of an agreement.[349] Even in the cases when the other contracting party proposes a model of an agreement, the Bulgarian institutions always insist on following the principles of the Convention. Furthermore, as was mentioned already, the Bulgarian government's policy is to conclude bilateral agreements for recruitment and temporary employment with countries with which there is a social security coordination agreement or such an instrument is under negotiation. The bilateral agreement with Israel for recruitment and temporary employment is also coupled with a social security agreement that was concluded in 2008.

In most of the cases, the personal scope of the agreements covers all persons who are or have been subject to the legislation of one or both contracting parties, as well as other persons who derive rights from such persons. The agreements between Bulgaria and Russia,[350] and Bulgaria and Ukraine,[351] however, have a very limited personal scope and concern only Russian, Ukrainian and Bulgarian citizens respectively.

Most of the agreements that Bulgaria has concluded with Eastern Partnership countries exclude family benefits and healthcare benefits. The agreements concluded with Ukraine, Moldova and Russia cover sickness cash benefits, including maternity benefits, old-age pensions, invalidity pensions, pensions in respect of accident at work and occupational diseases, survivors pensions and death grants. In addition, the agreements with Moldova and Ukraine also include in their material scope unemployment benefits, and the one with Russia – family benefits. The most generous agreement is with Albania, covering all types of already existing benefits, as well as all benefits that will be provided for in future.[352] The agreements with Eastern Partnership countries that Bulgaria has concluded cover mainly export of pensions.[353]

In cases where there is no bilateral agreement between Bulgaria and a third country, the Bulgarian ordinance on pensions and retirement does not provide for the payment of pensions abroad. Yet, in practice pensions are transferred via the post offices and the bank accounts of the pensioners. Thus, the person can

349 Interview # 15 with official, Bulgaria, July 2016, Annex III.
350 Article 3.
351 See Article 3, Article 1 (1) paragraphs 4 and 6.
352 Article 1.
353 For more details see, National Contact Point to the European Migration Network in Bulgaria, 'Migrant access to social security and healthcare: policies and practice. Main study' (2014).

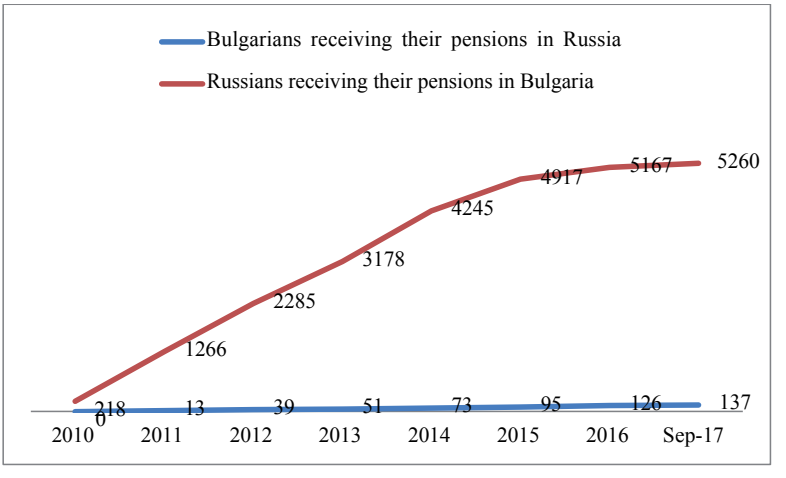
live abroad and receive the pension so long as they hold a Bulgarian account.[354] Finally, as was also the case in Poland, there are no legal provisions in Bulgarian social security law or any of the bilateral agreements that stipulate the possibility for social security contributions to be reimbursed, as these are not accessible to the migrants.

7.15. Social security coordination – implementation dynamics

As of September 2017, 51 Bulgarian pensions were transferred to Ukraine, on the basis of the bilateral agreement, to Bulgarians who had worked both in Bulgaria and Ukraine (see Graph 7.3).[355] On the other hand, 874 Ukrainian pensions were being paid in Bulgaria in the same reporting period. The implementation of the agreement between Moldova and Bulgaria is insignificant (see Graph 7.5). Against this background, the implementation dynamics of the agreement between Russia and Bulgaria differs drastically. The number of Russian pensions that are paid in Bulgaria is currently 5260 and the same figure for Bulgarian pensions paid in Russia is 137 (see Graph 7.4). One interviewed official said that in both cases the beneficiaries were mainly Russian citizens.[356] In addition, she shared that it was very challenging to keep the data up to date, because new pensioners were added or removed from the lists every month due to deaths that took place.

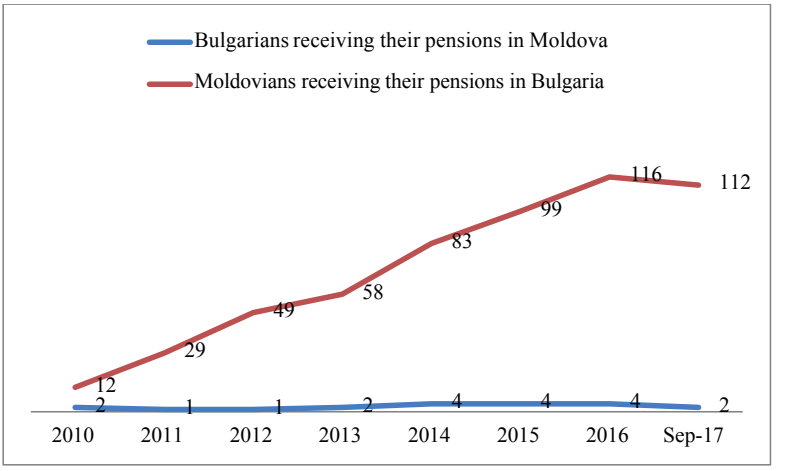
354 Interview # 15 with official, Bulgaria, July 2016, Annex III.
355 Data obtained from the National Insurance Institute in November 2017.
356 Ibid.

Graph 7.3. Implementation of the bilateral agreement between Bulgaria and Ukraine. Source: National Insurance Institute.



Graph 7.4. Implementation of the bilateral agreement between Bulgaria and Russia. Source: National Insurance Institute.

357 Data obtained in November 2017.



Graph 7.5. Implementation of the bilateral agreement between Bulgaria and Moldova. Source: National Insurance Institute.

The results from the conducted focus groups with migrants in both Bulgaria and Poland exhibited that the level of awareness about the existence and the aims of the social security bilateral agreements was very low. In the focus group with Ukrainian migrants, there were only two retired participants who knew about the agreement between Bulgaria and Ukraine.[358] The first migrant was a circular migrant during the Communist regime and started receiving an invalidity pension when she was still in Ukraine. Four months after she moved to Bulgaria in 1988, she started to receive her invalidity pension in Bulgaria on the basis of the former agreement that was in operation between the Soviet Union and Bulgaria. The second participant was actively engaged with the Ukrainian community in Bulgaria and she shared that Ukrainian women who married Bulgarians and moved to Bulgaria after they had worked in Ukraine, did not generally face any problems with the export and calculation of their pensions on the basis of the existing agreement. She was aware of how to proceed when she decided to retire in Bulgaria.

In the focus groups that were conducted with Russian migrants,[359] there was only one pensioner. She knew about the bilateral agreement between Russia and Bulgaria. She said that she received pensions from both countries and that she

358 Focus groups with Ukrainian migrants, Sofia, September 2016, Annex IV.
359 Focus groups with Russian migrants, Sofia, September 2016, Annex IV.

preferred to receive the Russian pension in a Russian bank because she often travelled to Russia to visit friends and family.

In Bulgaria, only two Blue Card holders that participated in the focus group with Russians knew that there was an agreement between Bulgaria and Russia.[360] They would only associate this agreement with the payment of pensions, something that was not currently on their agenda. They did not know the details of this agreement, however. Their main issue of concern was access to healthcare. As migrants they were only entitled to medical aid in emergency cases, and this was funded by the state budget.[361] Apart from that, unless they held long-term residence permits, they could not use the health care provided by the state or benefit from the Blue Card Directive or the bilateral agreement between Bulgaria and Russia because this was not part of the material scope of these instruments. Therefore, they all used private insurance.

7.16. Assessment

The analysed data shows that the bilateral agreements concluded by Bulgaria with the Eastern Partnership countries and with Russia contain provisions pertaining to the equality of treatment, maintenance of the acquired rights and rights in the course of acquisition under their legislation, totalisation of insurance, employment or residence periods, and of assimilated periods for the purposes of acquiring, maintaining or recovering rights and for the calculation and export of benefits (see Annex V). All of these fundamental principles, which are also contained in EU social security law, are applied in practice when Bulgaria is concluding bilateral agreements.

It follows that under Bulgarian law, it is not possible for social security contributions to be reimbursed – as per Article 27 (2) of the ICRMW –, in cases where the migrants and their families cannot access benefits due to waiting periods in the host country or where there is no bilateral agreement in force that regulates the export of benefits.[362]

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360 Focus group with Blue Card holders from Russia, Bulgaria, September 2016, Annex IV.

361 National Contact Point to the European Migration Network in Bulgaria, 'Migrant access to social security and healthcare: policies and practice. Main study', (2014), p. 22. See also T. Huddleston et al., 'Migrant Integration Policy Index', rethrieved at http://www.mipex.eu/bulgaria, (2015).

362 A recommendation in this regard is also expressed by H. Verschueren, 'Employment and Social Security Rights of Third-Country Labour Migrants under EU Law: An Incomplete Patchwork of Legal Protection', *European Journal of Migration and Law* 18 (2016), p. 407.

Regarding the material scope, and as was present in the case of Poland, all of the agreements between Bulgaria and the Eastern Partnership countries cover the export of pensions – old age, invalidity pensions, disability pensions in respect of an accident at work and occupational diseases and survivors' pensions. The possibility to export unemployment benefits is provided for in the agreement between Ukraine and Bulgaria. Family benefits are covered only in the agreement between Russia and Bulgaria. The agreement with Moldova, in addition to pensions, also covers sickness cash benefits and maternity benefits, death grants and unemployment benefits. Finally, none of the agreements provide for the possibility to export health care benefits, which in the case of Bulgaria could have remedied the situation of some migrants who cannot benefit from the state healthcare system before obtaining a long-term residence permit.

Even though this study does not apply any benchmarks in relation to the personal scope, two of the agreements between Bulgaria and Russia, and Bulgaria and Ukraine, demonstrate a potential source of concern for circular migrants. They have a narrow scope and only apply to the nationals of the contracting parties and can exclude migrants from benefiting from the provisions of the bilateral agreements and create additional gaps in a field that is already characterised by a patchwork framework. This problem is extremely salient in a region that is characterised by the movement of borders, which took place after the dissolution of the Soviet Union, as well as regional conflicts and intensive regional and internal migration.

Finally, the assessment also covers the availability of instruments that can support the implementation of international standards in the field of social security coordination: multilateral and bilateral social security agreements. Bulgaria has set a good example in this regard because the country actively uses the GAMM framework for the negotiation and conclusion of bilateral social security agreements. Despite that, the number of social security agreements with these countries is still rather low. As in the Polish case, the lack of awareness among the interviewed migrants in Bulgaria necessitates the adoption of an active information policy on these issues.

7.17. Entry and residence conditions for family migrants – instruments at the EU and national level

The Act on Foreigners stipulates that family members[363] can be granted a continuous residence permit in cases where: they have obtained a visa in accordance with Article 15, Para 1 under a simplified procedure,[364] following the approval of an application for family reunion; where they are joining a sponsor who is a foreigner that holds a continuous or permanent residence permit and where the documents certifying family ties and the right to support are recognised or admitted for execution under Bulgarian legislation (Article 24, Para 1 (13) of the AF). In order to be granted this residence permit, family members need to meet the requirements that are contained in Article 24, Para 2 of the AF mentioned above.

The Implementing Regulation of the Act on Foreigners stipulates that the sponsors that would like to reunite with their family members under the general provision for the granting of continuous permits (Article 24, Para 1 (13)), under the provisions for family reunification for Blue Card holders (Article 33к, Para 3) and the provisions for family reunification for ICTs (Article 33р, Para 1) must have an authorised stay of at least one year on the territory of Bulgaria in order to be able to submit a family reunification application (Article 12, Para 1).[365] As part of the family reunification application, they need to submit the documents that are required according to the directive, including a copy of the family member's passport, documentation that the state fee has been paid in accordance with Article 10, Para. 3 of Tariff No 4 on the fees collected in the system of the Ministry of Interior under the State Fees Act which is currently 10 BGN (5 EUR), evidence of secured accommodation, evidence of stable, regular, foreseeable and sufficient means of subsistence for the members of the family, without having to resort to the social

363 The definition of a family member in Bulgarian law covers a spouse, children of the foreigner and/or of his/her spouse, including any adopted children, who are not married minors and where one of the spouses has parental custody, and the children are dependent on him/her (Article 2, Para 3 of the AF). The children of a foreigner or his/her spouse, who have reached the age of 18 years-old and who are not married are also considered to be family members, in cases where significant medical reasons meant that they require personal care or where they are otherwise unable to provide for themselves (Article 2, Para 4 of the AF).

364 The family members are exempted from the requirement to present proof of secure accommodation, transport and sufficient means of subsistence when applying for a visa on family reunification grounds (Article 8, Para 4 of the AF in conjuction with Article 20, Para 1 (2) of the Ordinance on the terms and procedures for issuing visas and determining the visa regime).

365 The Implementing Regulation of the Act on Foreigners provides that family reunification for the ICT permit holders is not linked to the need for the holder to have been resident for a certain minimum period (Article 12, Para 9 of the AF).

assistance system for an amount that is not less than the minimum monthly salary or the minimum pension for the country for the period of residence on the territory of Bulgaria, a criminal conviction certificate of the family member, issued on the date of submission of the documents from the state of which the family member is a citizen or from the state of his/her habitual residence and a marriage and/or birth certificate.

The issuing of a continuous permit can be refused if the family member does not fulfil the abovementioned requirements, or in cases where they have entered into a sham marriage (Article 26, Paras 2, 3 and 4 of the AF). In case of a positive decision on the family reunification application, the family member submits, before the Migration Directorate or one of the MoI's Regional Directorates, a new application containing a copy of their passport, a copy of their visa as per Article 15, Para of the Act on Foreigners and the stamp showing their last entry into the country, as well as evidence of possessing the obligatory medical insurance that is valid for the entire territory of Bulgaria, and this must be done no later than 14 days before the expiry of the issued visa (Article 13, Para 1 of the Implementing Regulation of the AF). The foreigner must also pay a fee of 150 BGN (75 EUR) in accordance with Tariff No 4 on the fees collected in the system of the Ministry of Interior under the State Fees Act.

7.18. Entry and residence conditions for family migrants – implementation dynamics

The Ukrainian and Russian participants in the focus groups, as well as the interviewed experts, shared that the biggest obstacles in relation to family reunification were the requirements laid down in Bulgarian migration law for migrants to exit the country in order to change the grounds of stay in order to switch from one visa to another.[366] Since the law did not allow family members to enter at the same time as the sponsors, most of them were utilising visa C as an entry mechanism in order to avoid the waiting period that was inherent in the family reunification procedure. As a result, they had to exit the country after a three month stay in order to be able to then apply for a visa D, which would enable them to re-enter

366 Focus group with Blue Card holders from Russia, Bulgaria, September 2016, Annex IV; Focus group with Blue Card holders from Ukraine, Bulgaria, September 2016, Annex IV; Focus groups with Russian migrants, Sofia, September 2016, Annex IV; Interview # 9 with lawyer, Bulgaria, July 2016; Interview # 8 with lawyer, Bulgaria, July 2016, Annex III; Interview # 12 with representative of international organisation, Bulgaria, June, 2016, Annex III.

and apply for a continuous residence permit.[367] This requirement has the effect of seriously disrupting the migrants' family life.[368] This meant in practice that the parents had to continue paying for their children's kindergarten or school in order to keep their place there, alongside all of the other financial means that they had to invest in this "forced circulation".[369] One of the parents shared that their child had a "really bad year in school, just because they had to leave Bulgaria" which occurred as a result of this policy.[370]

The Blue Card permit holders raised two further issues in relation to family reunification. Firstly, what they found problematic was the fact that the spouses of Blue Card permit holders did not have direct access to the Bulgarian labour market. They had to find a job and an employer that was willing to apply for work authorisation on their behalf.[371] According to one of the interviewed business representatives, this was seen as an anti-settlement measure.[372]

This, however, is commensurate with the provisions of the directive. Article 15, Para 6 of the Blue Card Directive derogates from Article 14, Para 2 of the Family Reunion Directive, which has the effect of waiving the requirement for possible waiting period for access of family members to the labour market. Nevertheless, it does not waive the requirement that the sponsor and the family member need to have the same level of access to employment.[373] In the case of Bulgaria, and during the first two years of employment, the sponsor is restricted to employment that meets the criteria of the initial admission and this means that there is no equal access to the labour market on the same conditions as nationals. Family members, whose spouses are Blue Card holders and that are exempted from the labour market test, should also benefit from this more liberal access to the labour market.

One of the interviewed lawyers also stressed that the family reunification policy was extremely restrictive and "short-sighted".[374] She said that the more favourable visa procedure conditions that must apply to family members were not imple-

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367 Interview # 9 with lawyer, Bulgaria, July 2016, Annex III.

368 Focus group with Blue Card holders from Russia, Bulgaria, September 2016, Annex IV; Focus group with Blue Card holders from Ukraine, Bulgaria, September 2016, Annex IV; Focus groups with Russian migrants, Sofia, September 2016, Annex IV.

369 Focus groups with Ukrainian migrants, Sofia, September 2016, Annex IV.

370 Focus group with Blue Card holders from Russia, Bulgaria, September 2016, Annex IV.

371 Focus group with Blue Card holders from Ukraine, Bulgaria, September 2016; Interview # 20 with IT business representatives, Bulgaria, December 2016, Annex III.

372 Interview # 20 with IT business representatives, Bulgaria, December 2016, Annex III.

373 Steve Peers et al., *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Volume 2: EU Immigration Law*, p. 61.

374 Interview # 9 with lawyer, Bulgaria, July 2016, Annex III.

mented in practice and all applicants, even third-country nationals who were spouses of EU or Bulgarian nationals, had to wait up to 40 days instead of 15 days. In her opinion, the main reason behind this was the "complete ignorance" of consuls who were appointed on nepotism-based practices and did not even have any basic legal knowledge. The interviewee commented that she did not understand why the family members of a sponsor - who had already gone through the procedure for obtaining a work permit and thus had met all required conditions related to income, insurance and accommodation, which were evaluated as sufficient by the administration - had to go through the same bureaucratic hurdle again for his or her family members. She found it particularly striking that sponsors could not use the same evidence for the family reunification procedure that they had already submitted for their visa application and therefore they had to request all of these documents again. She said that based on her experience, the administration was allowing family reunification "without problems" in cases where sponsors had continuous residence.

One of the interviewed officials shared that family reunification was mainly refused on national security and public order grounds and in cases of registered partnerships and same sex marriages, which are not recognised as valid under Bulgarian law.[375] The data obtained from the Ministry of Interior shows that for a period of ten years, only 568 refusals (2.05%) were registered against the total number of 27 721 permits that were issued on family reunification grounds.[376]

The family reunification procedure took an average of two to three months after the application was submitted by the sponsor on the territory of Bulgaria to be completed.[377] Only one Blue Card holder shared that it took four months before his family members were able to join him.[378]

7.19. Assessment

According to Bulgarian legislation, migrant workers with continuous permits that authorise stay of at least one year in Bulgaria, as well as long-term and permanent residence permit holders, can be joined by their family members. In line with

375 Intreview # 2 with official, Bulgaria, July 2016, Annex III.
376 Data obtained from the Ministry of Interior.
377 Focus groups with Ukrainian migrants, Sofia, September 2016, Annex IV. Focus group with Blue Card holders from Russia, Bulgaria, September 2016, Annex IV; Focus group with Blue Card holders from Ukraine, Bulgaria, September 2016, Annex IV.
378 Focus group with Blue Card holders from Russia, Bulgaria, September 2016, Annex IV.

the Family Reunification Directive, Bulgarian law excludes seasonal workers and other special purpose workers with permits that are valid for a period of less than one year. The data showed that the procedure for changing visa grounds was perceived as more problematic than the family reunification procedure itself. With regards to the procedure, experts stressed that the visa facilitation for family members was not implemented in practice and that the procedure was a cumbersome one: a typical feature of Bulgarian migration legislation. Another problem that was identified by Blue Card holders was access to the labour market for their spouses, which required prior work authorisation.

Even though Bulgaria adheres to the Family Reunification Directive, its migration legislation does not facilitate family reunification in practice, which is not in line with the study's benchmarks. Removing the requirement to exit the country for a change of status, as is possible in Poland, would seriously improve the conditions for family reunification – something that was also pointed out by experts and the migrants themselves. In addition, providing for direct access to the labour market would make the Bulgarian Blue Card more attractive for foreigners. Apart from that, Bulgaria does not impose waiting periods or any other restrictive conditions, such as in relation to housing.

7.20. Recognition of academic and professional qualifications – instruments at the national level

7.20.1. Academic qualifications

The recognition of academic qualifications in Bulgaria is regulated by the Higher Education Act,[379] which stipulates that the Council of Ministers is to approve the state requirements for the recognition of higher education providing professional qualifications that have been acquired in foreign higher education institutions and the recognition of a degree acquired abroad corresponding to the educational and scientific degree "doctor" (Article 9, Para 3 (9)). In compliance with the Convention on Recognition of Qualifications Concerning Higher Education in the European Region (the Lisbon Convention), which Bulgaria ratified in 2000,[380] the

379 Закон за висшето образование, SG 112/ 27 December 1995, last amendment SG 98/ 9 December 2016. The Act on Pre-school and School Education (Закон за предучилищното и училищното образование), SG. 79/ 13 October 2015, also contains provisons on academic recognition in the pre-shool and school education. These matters fall outside the scope of this study.

380 By the adoption of the Act on the Ratification of the Convention on Recognition of Qualifications Concerning Higher Education in the European Region, SG 25 – 28 March 2000.

Council of Minsters adopted a Regulation on the State Requirements for Recognition of Higher Education Acquired or Periods of Education Completed in Foreign Higher Schools.[381] It provides the general regulatory framework for recognising academic qualifications and the specific administrative procedures in relation thereto are subject to the internal regulations of the relevant authorities.

According to the Regulation, the recognition of higher education that was acquired in a foreign higher education institution is carried out in order to provide access to further education in the higher education system, to upgrading training and to doctoral studies (Article 6, Para 1); to facilitate access to the labour market, as well as for other purposes where the applicant has a legal interest (Article 6, Para 3). This section focuses only on the former cases under Article 6, Para 1. The recognition procedure is organised by the higher education institution on the basis of its respective internal regulations (Article 7, Para 1 and 2 of the Regulation).

The Regulation stipulates the documents that applicants need to submit (Article 8 of the Regulation) and the main elements of the recognition procedure that the higher education institutions are required to follow (Article 10 of the Regulation). The recognition of higher education that was acquired at the foreign higher education institution must cover an assessment of the conformity of the data in the submitted documents with the state requirements for acquiring higher education in the Republic of Bulgaria (Article 11, Para 1 of the Regulation). Amongst other things, the following indicators are taken into account: the acceptance procedure of students; duration of the study; total tuition hours of studied subjects and/or acquired credits; learning outcomes of the training as a collection of the acquired knowledge, skills and competences obtained during the period of study (Article 11, Para 2 of the Regulation).

The recognition of higher education that has been acquired at a foreign higher education institution is to be refused when there are significant differences between the submitted data and the Bulgarian state requirements for the acquisition of higher education. The refusal may include a recommendation stipulating the possible measures that an applicant may take in order to obtain recognition at a later stage, including undertaking additional exams (Article 12 of the Regulation).

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381 Наредба за държавните изисквания за признаване на придобито висше образование и завършени периоди на обучение в чуждестранни висши училища, adopted by a Council of Ministers Decree No. 168 of 14 August 2000, SG No. 69 /22 August 2000, last amendment SG No 86/ 27 October 2017. In Bologna Process and European Higher Education Area, 'National Report regarding the Bologna Process Implementation. Bulgaria', rethrieved at http://media.ehea.info/file/Bulgaria/34/0/National_Report_Bulgaria_2003_576340.pdf, (2003), p. 4.

Sofia University, for instance, organises its recognition procedures in line with its Regulation for Recognition of Acquired Higher Education and Completed Periods of Study at Foreign Higher Schools.[382] The procedure is conducted by Expert Councils and the recognition of the diplomas is made on the basis of a decision by the Academic Council, approved by an order of the Rector (Article 8, Para 1 of the Sofia University Regulation). The Expert Councils are required to consider applications for recognition within two months of the date of submission of all the necessary documentation, which can be extended if there is a need for additional information (Article 13 of the Sofia University Regulation). The Academic Council determines the amount of administrative fees for the recognition process (Article 18 of the Sofia University Regulation).

7.20.2. Professional qualification

As in the case of Poland, the procedures for recognising professional qualifications differs depending on the type of the profession, i.e., regulated or non-regulated. Foreigners with diplomas for non-regulated professions do not generally need to have their diplomas recognised.[383] The recognition procedure may be conducted in cases where a potential employer or a Bulgarian authority expressly requires a recognition certificate that has been issued by the NCID in line with Article 6, Para 3 of the Ordinance on the State Requirements for Recognition of Higher Education Acquired or Periods of Education Completed in Foreign Higher Schools. The recognition procedure is organised by the Minister of Education and Science through the NCID in accordance with its Rules of Procedure (Article 7, Para 2 of the Regulation). The procedure follows the provisions of the Ordinance that was described in the academic qualifications section above. It is conducted by the Council for Academic Recognition that is in turn appointed by the Minister of Education and Science (Article 13 of NCID's Rules of Procedure), which may also invite consultants in cases where it requires external expertise (Article 19, Para 1 of NCID's Rules of Procedure).

382 Наредба за държавните изисквания за признаване на придобито висше образование и завършени периоди на обучение в чуждестранни висши училища, adopted by Protocol No. 7 of the Academic Council on 28 March 2012, as amended by Protocol No. 5 of the Academic Council on 27 February 2013, Protocol No. 10 of the Academic Council on 27 May 2015 and entered into force from the date of its adoption.

383 Interview # 3 with representative of NCID, Bulgaria, July 2016, Annex III.

With regards to regulated professions, the Act on the Recognition of Professional Qualifications (ARPQ) [384] states that specific categories of third-country nationals who have acquired professional qualifications in a Member State will enjoy the same rights as EU nationals in having their professional qualifications recognised. These categories are family members of a Bulgarian citizen or of a citizen of another Member State when that citizen has moved to Bulgaria; long-term residence or permanent residence holders or highly-qualified workers who hold a visa under Article 15, Para 1 of the AF (Article 8, Para 1 of the ARPQ). In cases where Bulgaria has concluded an international agreement with a third country that includes provisions for the mutual recognition of professional qualification in a particular profession, such as in the Agreement between Israel and Bulgaria,[385] the recognition of third-country nationals' qualifications that fall within the scope of the agreement is conducted under the agreed procedure (Article 8, Para 2 of ARPQ).

In cases where third-country nationals do not fall within the scope of any of these two categories, the recognition of professional qualifications in a regulated profession and that were acquired outside of the EU can be recognised under mutual recognition conditions that are established on a case-by-case basis. This may apply where the qualification complies with the Bulgarian regulatory requirements for the acquisition of the same professional qualification (Article 8, Para 3 of the ARPQ). In such cases, the responsible professional bodies of the regulated profession concerned have full discretion to assess the conformity of the acquired professional qualification with the current rules in Bulgaria and, if necessary, to impose compensatory measures if there are any significant differences.[386]

As was the case in Poland, the procedure for recognising qualifications that are needed in order to obtain the right to practice the profession of a physician is taken as an example. In accordance with Article 186, Para 3 of the Act on Health,[387] foreigners who wish to practice this profession, need to have a command of the

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384 Закон за признаване на професионални квалификации, SG. No 13/ 8 February 2008, last amendment SG. No 59 /29 July 2016.

385 According to the procedure for the implementation of the Agreement, at the request of the Office for Population and Immigration at the Ministry of the Interior of the State of Israel, some or all of the pre-selected workers included in a database by the Bulgarian Employemnt Agency may be required to take professional exams and /or interviews. Retrieved at: https://www.az.government.bg/pages/posrednichestvo-po-spogodbata-mezhdu-pravitelstvoto-na-republika-bulgaria-i-pravitelstvoto-na-darzhavata-izrael-za-posrednichestvo-i-vremenna-zaetost-na-grazhdanite-na-dvete-darzhavi/

386 Interview # 3 with representative of NCID, Bulgaria, July 2016, Annex III.

387 Закон за здравето, SG No 70/ 10 August 2004, entered in force 01 January 2005, last amendment SG No 58/18 July 2017.

Bulgarian language and of the professional terminology in the Bulgarian language, which is certified on the basis of an exam that is regulated in an ordinance issued by the Minister of Education, Youth and Science and the Minister of Health.[388] They also need to pass the state exams, which are determined in the Unified State Requirements for the Exercise of a Regulated Profession in the Field of "Medicine" (Article 186, Para 3, (3a)).[389]

In order to be admitted to sit the examination under Article 186, Para 3, (3a) of the Health Act, third-country nationals need to submit an application to the Minster of Health, containing amongst other things: copies of their diplomas with a legalised translation, an academic transcript, a certificate of command of the Bulgarian language, a medical certificate and documents certifying the lack of a criminal record and any disciplinary or administrative punishment that is related to the exercise of the profession.[390] The procedure for admission to an examination is organised and implemented by the Health Ministry's Directorate "Medical Activities".[391] The applications are examined by an Expert Commission that is designated by an order of the Minister of Health[392] under Article 79 of the Act on the Recognition of Professional Qualifications. The Commission issues a reasoned proposal to admit the applicant to the examination when the following conditions are met: the submitted documents certify a professional qualification that

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388 Наредба № 15 от 13.12.2005 г. за установяване на владеенето на български език и професионалната терминология на български език от чужденците за упражняване на медицинска професия в Република България (Regulation No. 15 of 13 December 2005 on establishing the knowledge of Bulgarian language and professional terminology in Bulgarian by foreigners for practicing a medical profession in the Republic of Bulgaria), SG No. 104 /27 December 2005, last amendment SG No.15 от 24 February 2015.

389 Currently covering five exams. For the exercise of a medical specialty, applicants are required to cover certain study programmes and successfully pass practical and theoretic examinations before the State Examination Commission, which are determined by an order of the Minister of Health (Article 186, Para 3, (3b) in conjunction with Article 180, Para 3 of the Act on Health).

390 The procedure is regulated in Regulation No. 4 of 27 May 2011 on the conditions and procedure for admission and examination of third-country nationals in line with Article 186, Para 3 (3) of the Law on Health, who have acquired a professional qualification in the medical profession and/or a specialty in the field of healthcare in a third country (Наредба no 4 от 27 май 2011 г. за условията и реда за допускане и явяване на изпит по чл. 186, ал. 3, т. 3 от Закона за здравето на граждани на трети държави, придобили професионална квалификация по медицинска професия и/или специалност в областта на здравеопазването в трета държава), issued by the Minister of Health, SG, No 43 of 07 June 2011.

391 In accordance to Article 29, item 16 of the Rules of Procedure of the Ministry of Health (Устройствен правилник на Министерството на здравеопазването), adopted by Council of Ministers Decree No 67 of 23.03.2015, SG No 23 of 27.03.2015.

392 In accordance with Article 6, Para 1 of Regulation No. 4 of 27 May 2011 on the conditions and procedure for admission and examination of Article 186, Para. 3, item 3 of the Act on Health, third-country nationals who have acquired a professional qualification in a medical profession and/or a specialty in the field of healthcare in a third country.

was acquired by the applicant in a regulated medical profession or specialty in Bulgaria; the specialty acquired by the applicant is relevant or can be assimilated to a specialty from the Bulgarian nomenclature of specialties in the healthcare system[393] and the applicant has not received any administrative, judicial or disciplinary penalties in relation to the exercise of the medical profession (Article 7, Para 2 of Regulation No 4 of 27.05.2011).

The examination under Article 186, Para 3, (3a) of the Health Act is organised and carried out by the higher education institutions twice a year (Article 10, Para 1 of Regulation No. 4 of 27.05.2011). After the applicants have successfully passed the Bulgarian language exam and the state exams, in order to be allowed to practice as a physician, they need to register with the National Register of the Bulgarian Medical Association. Along with the documents that certify that they have successfully passed the exams, they also need to present a certificate of good standing, a residence permit allowing long-term residence and other such documents that are stipulated in Article 32 of the Act on the Professional Organisations of Doctors and Doctors of Dental Medicine.[394]

Foreigners who wish to practice the profession of a nurse must follow a similar procedure which requires successfully completing a Bulgarian language exam and an exam in line with the abovementioned Regulation No. 4 of 27 May 2011 in conjunction with the Regulation on the Unified State Requirements for Higher Education in the Nursing and Midwifery Courses for Bachelor Degree.[395] After they have successfully passed these exams, they also need to register with the Bulgarian Association of Health Care Professionals in line with the Act on the Professional Organisations of Nurses, Midwives and Associated Medical Specialists.[396]

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393 Defined by the Regulation under Article 181, Para 1 of the Act on Health.

394 Закон за съсловните организации на лекарите и на лекарите по дентална медицина, SG No 83/21 July 1998.

395 Наредба за единните държавни изисквания за придобиване на висше образование по специалностите «Медицинска сестра» и «Акушерка» за образователно-квалификационна степен "бакалавър", adopted by Decree of the Council of Ministers No 248 of 22 November 2005, SG 95 of 29 November 2005, last amendment SG No. 88 of 09 November 2010.

396 Закон за съсловната организация на медицинските сестри, акушерките и асоциираните медицински специалисти, SG No 46/ 3 June 2005, last amendment SG No103/ 27 December 2016.

7.21. Recognition of qualifications – implementation dynamics

The interview with a representative of the ENIC/NARIC centre in Bulgaria shared that the centre did not have information on problems with academic recognition within the EU.[397] However, they mentioned that there were sometimes problems in relation to the recognition of diplomas between Bulgaria and third countries. The interviewee said that the "best known" example concerned Turkey. According to him, a few years ago Turkey had ceased recognising academic qualifications for a period of time and did not give access to the higher education system professions in Turkey. This issue was, however, no longer on the agenda.

One of the Ukrainian participants in the focus groups had qualified as a physician and shared her experience with the recognition procedures.[398] The respondent moved to Bulgaria as a family member of a migrant worker in 2015. She stressed that she was determined to start working as a doctor, so she did everything to learn the Bulgarian language so as to pass the required language exam. The Ukrainian focus group participant was surprised to find out that she had to pass seven exams in medicine (five state exams and two speciality exams) and a language exam. She added:

> "I feel insecure because these exams will take more than 1 year, maybe 2 years. We cannot work - neither as middle medical staff nor as doctors - and anyone looking for a job in a specialty cannot find anything, absolutely nothing." "Many good specialists just go back to Ukraine. And all my friends who wanted to work as doctors just want to go back to Ukraine because it is an unreal situation (...)".[399]

She remarked, however, that the language exam was free and very accessible. The interviewee claimed, however, that she had to pay 250 BGN (125 EUR) per exam. Furthermore, she stressed that she had graduated 27 years ago and the requirement to pass all these state exams was very burdensome and unreasonable because she had chosen to specialise in neurology, and if she wanted to get her professional qualifications recognised, then she would have to pass exams in areas such as gynaecology, obstetrics, surgery and anaesthesiology.[400] Meanwhile, she had to work as a consultant in an insurance company in order to make

397 Interview # 3 with representative of NCID, Bulgaria, July 2016, Annex III.
398 Focus groups with Ukrainian migrants, Bulgaria, September 2016, Annex IV.
399 Focus groups with Ukrainian migrants, Bulgaria, September 2016, Annex IV.
400 Focus groups with Ukrainian migrants, Bulgaria, September 2016, Annex IV.

a living. Her only "access" to the medical profession was to work as a doctor at medical centres in the Black sea resorts during the summer months, where Russian-speaking doctors were in demand. She further remarked that: "It's also unofficial, we work as students like paramedics and sometimes they say that we are translators or secretaries (...) It's just very humiliating for our specialists".[401]

In her opinion, the current legislation complicated the situation for migrants who wanted to have their diplomas recognised and to be able to work as doctors. This meant that they were looking for other opportunities to work in Western Europe, which essentially turned Bulgaria into a "transit point". She stressed that she could not go back to Ukraine because her home was too close to the Donbas region. [402]

One of the interviewed lawyers reiterated the problems that migrants faced in having their qualifications recognised in regulated professions.[403] She stressed that unless one falls under the EU legislation, there was "a huge gap" in the field of recognition of qualifications. According to the interviewee, the only instrument that the administration used to recognise a profession was equivalency exams, which for migrants meant spending additional financial means and wasting time on a qualification that they had already acquired, just so that they could practice in Bulgaria. For third-country nationals who obtained their education outside the EU, there was no other option for recognition such as, for example, to go through some brief testing and verification of the diploma, which would give them the right to work in that profession in Bulgaria.

Against this background, the interview with a representative of the Bulgarian Medical Association revealed that Bulgaria was experiencing an increased emigration rate of graduates with medical qualifications: up to 90% of them were leaving Bulgaria upon graduation from the Bulgarian medical universities.[404] In response to the question of whether the recruitment of foreign doctors was a measure that the Association could pursue, the representative answered that there was currently no working mechanism for the recognition of qualifications and the Association was not aware of the quality of the medical diplomas granted in third countries.

The obtained data from the Bulgarian Medical Chamber shows that, as of September 2017, there are 550 doctors in Bulgaria who are EU and third-country

401 Focus groups with Ukrainian migrants, Bulgaria, September 2016, Annex IV.
402 Focus groups with Ukrainian migrants, Bulgaria, September 2016, Annex IV.
403 Interview # 9 with lawyer, Bulgaria, July 2016, Annex III.
404 Interview # 21 with representative of the Bulgarian Medical Association, Bulgaria, January 2017, Annex III.

nationals.[405] The number of practicing doctors in Bulgaria totals 28 863.[406] The third-country nationals are mainly from Macedonia (83), Syria (69), India (60) and Russia (59). Most of them obtained their medical education in Bulgaria and have stayed in the country or have studied in one of the former USSR republics. Therefore, the representative of the Bulgarian Medical Association that was interviewed said that it made sense to target the former Soviet Union republics for the recruitment of doctors in the future because they were willing to come to Bulgaria, since they had lower standard of living in their countries of origin. The interviewee gave an example of a good practice that was present in a former bilateral agreement between Bulgaria and Russia/USSR for the exchange of specialists in the medical field.[407]

In addition, the obtained data on issued Blue Card permits shows that since the directive was implemented in Bulgaria in 2011, only two permits were issued to doctors.[408]

7.22. Assessment

As in the case of Poland, the main issues in the field of recognition of qualifications in Bulgaria concerns access to the regulated professions. The cumbersome and burdensome procedures currently lead to brain waste and secondary outflow of medical specialists to other EU Member States. There are no specialised instruments to support and facilitate the recognition of qualifications between Bulgaria on the one hand, and the Eastern Partnership countries and Russia on the other, despite the fact that the Bulgarian state has witnessed a high emigration rate of doctors in recent years. No problems were registered in relation to the recognition of academic qualifications for further academic studies or for work in non-regulated professions. In this field, Bulgaria therefore adheres to it international obligations.

405 Data obtained from the National Register of the Bulgarian Medical Chamber in September 2017.
406 Национален Статистически Институт, Статистически справочник 2016 (National Statistical Institute, Statistical Guide 2016), p. 94.
407 Interview # 21 with representative of the Bulgarian Medical Association, Bulgaria, January 2017, Annex III.
408 Data obtained from the Minsitry of Interior in October 2017.

7.23. Conclusions to Chapter 7

Bulgaria has established labour migration legislation, which leads to "forced circulation" on the basis of both national and EU law. Due to the restrictive entry conditions and the existing involuntary circulation mechanisms for the change of visas and statuses, the main desire of migrants is to achieve security of residence after five years and to not have to circulate between their countries of origin and destination. This type of circular migration approach resembles the guest-worker's model and does not provide for a migrant-led trajectory. Furthermore, it is a breeding ground for the exploitation and abuse of migrant and their rights. It forces migrants to actively circumvent the applicable legislation, thereby leading to dependency on employers and leaves wide discretion to the administration.

Along with the restrictive national legislation that reinforces the "forced circularity" model, the Bulgarian administration plans to use bilateral agreements in order to facilitate circular migration in line with its policy to keep migrants in a temporary position. This seems to be the preferred model of labour migration management that has been in existence in Bulgaria since the Communist regime. The main target countries of this circular migration policy are primarily the Eastern Partnership countries with Bulgarian communities, which the Bulgarian government is trying to attract in every way possible, for example, by introducing overlapping policy instruments, including fast-track access to Bulgarian citizenship.

As in the case of Poland, Bulgaria has still not developed a comprehensive national migration policy, which goes beyond the long-term aims for accession to the Schengen Area and attracting foreigners of Bulgarian origin. It has still not been officially articulated at either the political or policy level that Bulgaria needs labour migration. The empirical data on the implementation of the different instruments shows that as a result of pressure from business organisations, which have lobbied the government to introduce more flexible avenues for the recruitment of foreign workers, this *status quo* is slowly starting to change. For the first time since 2008, the government is re-launching its commitment to negotiating bilateral agreements with third countries, from the perspective of a receiving country. However, the analysis of the agreement with Israel reveals that the country is applying a utilitarian approach towards migrant workers, which is not balanced out with provisions allowing for the protection of their rights.

The lack of a comprehensive migration policy, which acknowledges the general need for labour migration from third countries, also explains why the transposition of the sectorial EU labour migration directives into Bulgarian law renders the possibilities created by these EU norms ineffective in the majority of cases. Transposing the minimal standards or the most restrictive options that the EU labour migration Directives provide for within the margin of appreciation to Member States is aligned with the perception that labour migration is something temporary and unwanted. Therefore, instead of establishing workable procedures which would match the needs of the labour market, the current transposition techniques follow Bulgaria's "copy and paste" pre-accession model, aiming solely to demonstrate to its EU counterparts that its obligations have been fulfilled. Yet, EU norm transposition in the field of labour migration is still the only way in which migrant workers, who are not of Bulgarian origin, can gain more rights. In this field, the case law of the CJEU and the European Commission's infringement procedures, as well as the lobbying of stakeholders, have had tangible results.

CHAPTER 8:

Comparative analysis, general conclusions and recommendations

8.1. Introduction

The analysis contained in the chapters on Bulgaria and Poland demonstrated that the EU's circular migration concept has entered the migration policy agendas of these two countries as part of the policy transfer that has been driven by the process of Europeanisation. Furthermore, it became clear that the concept of circular migration, as it has been promoted by the EU, serves as an empty shell that is filled by different EU and national instruments, depending on local contexts and labour market needs. This chapter compares the instruments that have been employed and developed under the umbrella of circular migration, as well as those falling outside its scope, but which are nevertheless of importance to the facilitation of this type of migration. It also sheds light on the challenges that migrant workers currently face. Finally, it answers the main research question of this study, namely: how has the EU's approach to circular migration been implemented through its legal and policy instruments and does it provide for rights-based circularity for migrant workers in the Central and Eastern European context, and it provides policy recommendations to this end.

8.2. Entry and re-entry conditions

In their respective EU accession periods, both Bulgaria and Poland had no choice but to adapt to the EU conditionality. Nonetheless, their approaches differed. In the field of Justice and Home Affairs, the Schengen *acquis* transferring rules on visa and borders was the EU policy that caused the most amount of controversy at the national level, because it had the potential to affect the political and economic relations with the rest of their neighbours and partners in Central and Eastern

Europe (CEE).[1] Therefore, the EU visa policies turned out to be illustrative for the different conditionality strategies that were adopted by Poland and Bulgaria.

Poland had a clear national interest when it came to its eastern borders, and therefore its strategy was "combative, involving tough negotiating stances and slow implementation of the policies that caused most domestic controversy".[2] On the other hand, Bulgaria's approach was that of "catch-up and imitation"; [3] its main desire was to leave the EU's negative visa list and to show its EU partners that it could be fully trusted to implement the *acquis*.[4] These two different strategies continued to shape the migration policies of these two countries, even after they became EU Member States.

The policy measures and regulations pertaining to entry and re-entry conditions that Poland developed after its accession to the EU aimed to compensate for the barriers that were erected by the Schengen *acquis* between Poland and its neighbours.[5] At the EU level, Poland advocated a visa-free regime between the EU and the neighbouring CIS countries, it initiated the European Union's Eastern Partnership and supported the introduction of a separate local border traffic regime at the external borders, which ultimately led to the conclusion of a local border traffic agreement with Ukraine in 2008.[6] Poland transposed the EU labour migration legislation in a rather flexible manner in comparison to Bulgaria, as it allowed for

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1 H. Grabbe, *The EU's Transformative Power. Europeanization Through Conditionality in Central and Eastern Europe* (Palgrave Studies in European Union Politics: Palgrave Macmillan UK 2006), p. 168. A. Kicinger and I. Koryś, 'The case of Poland', in M. Borkert, R. Penninx, and G. Zincone (eds.), *Migration Policymaking in Europe: The Dynamics of Actors and Contexts in Past and Present* (IMISCOE Research Series: Amsterdam University Press, 2011), p. 372. E. Jileva, 'Larger Than the European Union: The Emerging EU Migration Regime and Enlargement', in S. Lavenex and E. M. Uçarer (eds.), *Migration and the Externalities of European Integration* (Lanham, MD: Lexington Books, 2002). Another one was the refuge protection system and the requirements contained in the so-called Dublin II Regulation.

2 Grabbe, *The EU's Transformative Power. Europeanization Through Conditionality in Central and Eastern Europe*, p. 111.

3 Ibid.

4 Ibid., p. 175; Jileva, 'Larger Than the European Union: The Emerging EU Migration Regime and Enlargement', p. 81. A. Gros-Tchorbadjiyska, 'The Europeanization of Visa Policy: A Transfer of Sovereignty Shaped by enlargement', (Katholieke Universiteit Leuven 2010), p. 421.

5 K. Iglicka and K. Gmaj, 'Circular Migration Patterns between Ukarine and Poland', in A. Triandafyllidou (ed.), *Circular migration between Europe and its neighbourhood : choice or necessity?* (Oxford: Oxford University Press, 2013), p. 170.

6 See A. Kicinger, A. Weinar, and A. Gorny, 'Advanced yet Uneven: the Europeanization of Polish Immigration Policy', in T. Faist and A. Ette (eds.), *The Europeanization of National Policies and Politics of Immigration: Between Autonomy and the European Union* (Palgrave Macmillan, 2007), p. 189. M. Lesinska et al., 'Migration Policy in Poland and its impact on the inflows and settlement of immigrants', in I. Grabowska-Lusinska et al. (eds.), *Immigration to Poland: Policy, Employment, Integration* (Warszawa: Wydawnictwo Naukowe Scholar, 2010), p. 66.

applications and change of status to be effected both from outside and within the country. Besides, after its accession to the EU, Poland started to gradually liberalise access to its labour market through enacting a wide variety of exemptions, on the basis of several regulations, from the requirement to obtain work permit applications and the need to perform a labour market test.

Poland was also as active at the national level: it introduced visa issuing facilitation and specific measures, which fostered circular migration from some of the Eastern Partnership countries. After the Schengen *acquis* was implemented, the citizens of Ukraine, Moldova and Belarus became exempt from paying the consular fees for the processing of visa applications, when applying for Polish long-stay visas. Furthermore, it developed two new instruments: the *Karta Polaka* – an instrument based on Polish ethnicity – and the *Oświadczenie* procedure, which gradually became open to citizens of five Eastern Partnership countries and Russia through the GAMM framework.

By way of contrast to Poland, Bulgaria assumed the role of a "policy taker" and it did not respond as actively to the barriers that were introduced as a result of the adoption of the Schengen *acquis*, neither at the EU nor at the national level. Rather, the Bulgarian "catch-up and imitation" model persisted long after its accession to the EU, and Bulgaria's main aim was ensuring that it would be able to accede to the Schengen Area. The Europeanisation process continued through a rushed "copy and paste" transposition of EU laws, leading to restrictive and impractical provisions in line with Bulgaria's national migration policy, which is centred on ensuring the "temporality" of the migrant workers' stay in Bulgaria. Access to the labour market for migrants is subject, in the majority of cases, to obtaining a negative result from a labour market test. Furthermore, foreign workers are supposed to stay in the country only for a limited period of time, until they or their respective employers train a Bulgarian or another legally resident foreigner to take up the job in question. Currently, all categories of migrant workers (even Blue Card holders) need to exit the country for a minimum period of time in order to renew their permits or change their status.

The EU pre-accession models of Bulgaria and Poland also provide an explanation for the (lack of) developed circular migration instruments by presenting two contrasting examples. Poland's "combative" strategy was characterised by a strong national stance on maintaining close contact with the Eastern neighbourhood, and this led to the development of instruments facilitating circular migration at both the EU and the national level. The entry and re-entry conditions that

they provide for consequently allow for a migrant led-trajectory and are conducive to voluntary circulation.

This conclusion is also supported by the analysis of the gathered empirical data. The focus group participants in Poland shared diverse experiences with regards to circular migration, which in most of the cases allowed for circularity that was supported through various instruments, depending on the migrants' individual circumstances. The main problem that was identified, however, concerned the implementation of the *Oświadczenie* procedure, which in many instances involved the use of fake declarations, which enabled migrants to enter Poland to look for a job and obtain a new *Oświadczenie* (declaration) stating the real employment or to find other ways to "legalise their stay". Seasonal workers, however, used the *Oświadczenie* procedure as means to gain entry into Poland, but in most of the cases they did not seek to regularise their work by signing a contract to this effect.[7] These problems naturally place migrant workers in a vulnerable position and it can lead to abuse by their employers. Therefore, Poland needs to concentrate more efforts on the enforcement of rights-based circulation and protection of migrants' rights.

7 See Chapter 6, section. 6.6.1.

Entry/ re-entry conditions	**Poland**		**Bulgaria**	
Instruments	**EU**	**National**	**EU**	**National**
Legal perspective	Visa-facilitation/ liberalisation as part of the EaP LBT GAMM Directives	*Oświadczenie* procedure *Karta Polaka* Long-term Visa Labour market test exemptions	Visa-facilitation/ liberalisation as part of the EaP Directives	Bilateral agreements (pending) Additional measures for foreigners of Bulgarian origin
Empirical perspective	Flexible Voluntary circulation possible but not used	Flexible but problems with irregular stay/ fake declarations Voluntary circulation used	Restrictive with circumvention practices Forced circulation	Restrictive Forced circulation
Assessment	Migrant led circulation friendly instruments but problems with the protection of migrant workers' rights Periods of absence not used as a circular migration friendly instrument		No migrant-led circulation friendly instruments and problems with protection of migrant workers' rights Periods of absence not used as a circular migration friendly instrument	

Table 8.1. Entry and re-entry conditions: comparative perspective. Source: author's own compilation.

On the other hand, the understanding of circular migration in Bulgaria is characterised by "restrictive temporality". The main national instrument that pertains to the EU's approach to circular migration is a bilateral agreement for temporary labour migration, which aims to attract migrants from the Eastern Partnership countries. These countries were selected in light of the other main feature of the national migration policy: attracting foreign nationals of Bulgarian origin who are expected to integrate more easily into Bulgarian society. This is the only privileged group that can benefit from numerous overlapping measures, spanning from temporary labour migration agreements, to facilitated access to work and permanent residence permits and a fast-track procedure for acquiring Bulgarian citizenship.[8]

8 See Chapter 7, section 7.7. for more details in this regard.

The analysis of Bulgarian migration law and the empirical data gathered demonstrates that the restrictive entry and re-entry conditions that Bulgaria has established on the basis of both national and EU law leads to "forced circulation" in general. Due to the involuntary circulation mechanisms for change of visas and statuses, the migrants' main desire is to achieve security of residence after five years and to not have to circulate between their country of origin and their country of destination any more. Seasonal workers are probably the only exception in this regard. However, until the last winter season they were still the victim of informal economy arrangements. Thus, this study suggests that the Bulgarian circular migration approach resembles the guest worker model[9] and it is not conducive to a migrant-led trajectory. Furthermore, it has created a breeding ground for abuses of migrants' rights and it can lead to exploitation. It forces migrants to circumvent the applicable legislation, leads to dependency on employers and leaves wide discretion to the administration to take decisions about migrants' lives.

This notwithstanding, EU law is the only channel that could lead to the facilitation of circular migration in Bulgaria: the visa-liberalisation regimes and the EU's desire to turn the Blue Card into a more effective instrument are expected to lead to greater opportunities for facilitated entry and re-entry. In addition, as a result of the infringement procedures against Bulgaria,[10] as well as the lobbying carried out by business organisations, the incorrect and cumbersome national transposition measures are slowly being brought more in line with their *effet utile.*

8.3. Work authorisation

Bulgaria and Poland's differing approaches are also evident in the field of work authorisation. Poland's voluntary circulation policy is implemented on the basis of both national and EU instruments. The national instruments differ in their scope insofar as they allow for a change of employer and occupation, as well as the implications that unemployment has on the status of the permit. For instance, these rights are not explicitly provided for migrant workers coming to Poland under the *Oświadczenie* procedure. Yet, on the basis of this flexible system, migrants are able to change their employer and avoid unemployment by having another declaration registered within their authorised period of stay. The *Karta Polaka*, on the other hand, does not pose any restrictions regarding the change of

9 See Chapter 2, section 2.2. for more details in this regard.

10 On the incorrect implementation of Directive 2003/109/EC concerning disproportionate fees, see Chapter 7 for more detail.

employer or occupation for migrants. In the Bulgarian case, the national regime does not contain any of these international standards and uses these cases to implement its forced circularity model. The only exceptions are those which have been introduced through EU law.[11]

The analysis of the empirical data suggests certain problems with regards to the protection of migrants' rights in both countries. In the case of Poland, along with the fact that the *Oświadczenie* procedure does not explicitly provide the right to change employer and occupation, as well as to look for an alternative job in case they become unemployed, the unlawful practices of the Local Labour Offices that oversee the application of this instrument to introduce additional requirements, in turn leads to legal uncertainty and places migrant workers in a vulnerable position. Another problem in relation to this instrument is the reported cases of migrant workers who have suffered abuse due to the fact that they have not signed a contract of employment. In Bulgaria, the standards in this field are absent from both the general migration legal framework and from the developed special national instruments. The forced circular migration logic, combined with the lack of flexible solutions to change employer and occupation, as well as the risk of becoming unemployed, essentially binds migrant workers to their employers.

When it comes to the transposition of the EU labour migration *acquis*, both countries have established bureaucratic and burdensome procedures, which in most cases lead to unpractical solutions. For instance, the implementation of the Single Permit Directive in Poland has led to workers being bound to their employer, because the transposition into Polish law has made it extremely difficult for those workers to change employer and occupation. In the case of Bulgaria, the transposition of EU labour migration law is the only way through which standards in this field can become embedded in the Bulgarian legal order. Thus, it is currently only Blue Card holders and seasonal work permit holders that, on the basis of EU law, can benefit from the right to change employer and stay in the country if they become unemployed. Neither Poland nor Bulgaria have adopted measures that allow researchers to change employer and neither do they provide the possibility for researchers to find alternative job in the event that they become unemployed.

11 This will change after 23 May 2018 when the latest amendments of the Act on Labour Migration and Labour Mobility of 16 March 2018 will enter into force (SG No 24/16 March 2018). The amended Article 8 (3) ALMLM now provides that foreigners from Bulgarian origin will be able to work in Bulgaria without a work authorisation after a registration by the employer in the Employment Agency.

8.4. Residence status

Both case studies demonstrate that, in general, circular migration and the accumulation of continuous residence periods, which in most cases are needed in order to obtain a long-term residence or permanent residence status, are mutually exclusive. Migrant workers that are engaged in circulation need to either change their migration trajectory or utilise the limited permitted absences that are available under the EU and national permits. The empirical data analysis demonstrates that migrants that have decided to obtain a long-term or permanent residence status prefer not to engage in circulation for work purposes, because this is perceived as being too risky.

The two case studies, however, differ regarding access to permits that allow their holders to transit from a temporary to a more permanent status. The Polish model provides some flexibility for circular migrants, on the basis of the *Oświadczenie* procedure, to transfer to a single permit and thereby start accumulating residence periods, which would in turn make them eligible for a long-term residence or permanent residence status. *Karta Polaka* holders also have facilitated access to settlement on the basis of the national permanent residence permit. Nevertheless, despite the opportunity to transit to single permit, the analysis of the implementation data in Poland highlighted a problem with the secondary transition from a single permit to a permanent or long-term residence permit. The demanding requirements that are required as a result of the transposition of the EU Long-term Residence Directive into Polish law, as well as the cumbersome procedure for its implementation make it very difficult, especially for low-skilled migrants, to actually access this type of permit. Migrants shared that the main challenges were related to their dependency on employers while on a single permit, who very often-required low-skilled migrants to pay for their own social security contributions, as well as to the requirement for continuous employment.

By way of contrast, migrants in Bulgaria cannot transfer from one status to another, at least while they are in the country. Furthermore, the Bulgarian migration legislation, which is based on the notion of forced circulation, currently renders access to permanent or long-term residence practically impossible for all migrant workers, except for foreigners who can prove that they are of Bulgarian origin, and possibly Blue Card holders, if the pending legal amendments to the ALMLM are adopted.[12] Therefore, the circumvention practices that were docu-

12 See Chapter 7, section 7.5.2.1 for more details in this regard.

mented in Bulgaria (e.g., registration of trade representation) are the only ways for migrant workers to access a more secure status in Bulgaria.

In both countries, access to permanent residence status is only facilitated for certain privileged groups of migrants, which both countries try to attract on the basis of their ethnic origin.

Residence Status	**Poland**		**Bulgaria**	
Instruments	**Long-term Residence Directive**	**National permanent residence status**	**Long-term Residence Directive**	**National permanent residence status**
Legal perspective	*Oświadczenie* can give access to Single Permit, which allows access to long-term residence	*Karta Polaka* can give access to settlement	Blue Card holders (possibly) have access The rest of the migrant workers need to have interrupted periods of stay	Foreigners of Bulgarian origin have facilitated access
Empirical perspective	Change of migrant trajectory needed: circulation must stop for five years Cumbersome access to long-term residence Dependency on employer due to requirement for continuous employment	Very narrow target group	Restrictive legislation leads to circumvention practices	n/a
Assessment	Facilitation to settlement status is available only on the basis of ethnic origin. Burdensome requirements for low-skilled workers under the EU Long-term Residence Directive		Facilitation to settlement status is available only on the basis of ethnic origin. The forced circulation models requires interruption of stay for almost all migrant workers	

Table 8.2. Residence status: comparative perspective. Source: author's own compilation.

8.5. Social security coordination

The analysis presented shows that the bilateral agreements that have been concluded by both Bulgaria and Poland with the Eastern Partnership countries cover all of the basic social security coordination principles, which are also contained in EU social security law. However, neither country has legislated for the reimbursement of social security contributions, in cases where migrants and their families cannot access benefits due to waiting periods in the host country or the lack of a bilateral agreement that provides for the export of benefits. This is a provision contained in Article 27 (2) of the UN Convention on the Protection of the Rights of all Migrant Workers and the Members of Their Family.[13] This standard should be especially considered in the context of the short-term circular migration of seasonal workers. [14]

With regards to the material scope, all agreements between Bulgaria and Poland and the Eastern Partnership countries have a narrower scope than Regulation No. 883/2004. They all cover pensions – old age, invalidity pensions, disability pensions in respect of accidents at work and occupational diseases and survivors pensions. Apart from this, the agreements with the different countries vary in other areas. For instance, family benefits are covered only in the agreement between Russia and Bulgaria. In addition, it seems that for Ukraine, unemployment benefits are an important issue because it is provided in both agreements between Ukraine and Poland, and Ukraine and Bulgaria respectively. Shedding more light on the reasons for that, however, would require additional field research covering interviews with delegation members who were part of the negotiations of the agreements.

The agreements between Bulgaria and Russia, and Bulgaria and Ukraine, demonstrate another potential source of vulnerability for circular migrants. Both have a very narrow personal scope insofar as they only cover nationals of the contracting parties and they can exclude third-country nationals from benefiting from the provisions of the bilateral agreements and create additional gaps in a field that is already plagued with inconsistencies.

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13 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, 18 December 1990.

14 A recommendation in this regard is also expressed by H. Verschueren, 'Employment and Social Security Rights of Third-Country Labour Migrants under EU Law: An Incomplete Patchwork of Legal Protection', *European Journal of Migration and Law* 18 (2016), p. 407.

This study has demonstrated that the number of bilateral agreements, which are the main instrument used in the field of social security coordination, is low despite the cultural, historical and geographic proximity of Bulgaria and Poland with the countries in the Eastern Partnership. It seems that the policy channels, provided by the GAMM, do not do enough to facilitate the process of starting negotiations with these countries, even though Bulgaria is actively using such a process.

Another problem that has been identified in both countries pertains to the implementation of these instruments. The lack of awareness among the interviewed migrants, as well as the low number of beneficiaries of the agreements, especially in the case of Poland, means that there is a need for an active information policy on these issues, which are very technical and not easily understandable by migrants who do not necessarily have a good understanding of the local language. Migrants need to be actively informed about their rights during their period of circulation. Waiting until the age of retirement could lead to the loss of entitlement or problems created by the lack of documents that need to be presented to the respective social security institution.

8.6. Entry and residence conditions for family members

The two case studies differ with regards to eligibility for family reunification. Bulgaria allows migrant workers that hold continuous residence permits with an authorised stay of at least one year, to reunite with their family members; whereas Poland constrains sponsors with temporary permits by imposing a two-year delay. The Polish legislation explicitly excludes migrant workers that reside on the basis of a visa, such as those entering Poland through the *Oświadczenie* procedure or the *Karta Polaka*, who need to transfer to a single permit in order to be able to apply for family reunification. In the case of Bulgaria, this exclusion covers all migrants whose permit is for a period of validity of less than one year, such as seasonal workers and some ICTs that come for a shorter period of time.

The interviewed migrants and stakeholders stressed that the income and fee requirements for families to reunite in Poland made it difficult for migrants employed in low-skilled sectors and middle-skilled jobs to satisfy the criteria. Even though the Polish legislation imposes a basic legal income requirement, the required sum is per family member and migrants also face relatively high fees. No problems were raised in this regard in Bulgaria, despite the fact that before the

amendments in Tariff No. 4, the family reunification fees were regarded as being disproportionately burdensome.[15]

In the case of Poland, the demanding two year waiting period requirement resulted in migrants adopting circumvention practices: family members joined their spouses in Poland on the basis of a visa and then utilised an opportunity provided by the Act on Foreigners to later apply for a "permit based on other circumstances" while they were inside the country. This circumvention practice, however, did not remedy the problems arising from the income requirement for some low-skilled migrants. A similar circumvention practice was also witnessed in Bulgaria, which, however, was disrupted by the forced circular migration practice that is inherent in Bulgarian migration law. After entering on the basis of visa C, family members had to leave the country and then re-apply for visa D, which led to serious disturbances in their family lives, especially when it came to children. In the Bulgarian case, some problems were also witnessed in relation to the obligation to issue a visa within 15 days of the family reunification being authorised, which was not implemented in practice.

In both countries Blue Card holders, as well as ICTs with a permit authorising stay for up to one year in the case of Bulgaria, are the only categories of migrant workers that are able to benefit from some kind of family reunification. The restrictive and cumbersome procedures, however, do not stop the other categories of migrants from finding ways to reunite with their families, even though the EU and thus the national legislative frameworks, make it impossible to be both a short-term low-skilled circular migrant and, at the same time, be entitled to family reunification.

8.7. Recognition of qualifications

The analysis of the national legislation and the gathered empirical data in Bulgaria and Poland suggests that the main issues in the field of the recognition of qualifications concerns entry to regulated professions. Both countries have established long and demanding procedures for recognising qualifications in regulated procedures, consisting of several stages: demonstrating proficiency in the native language and the specific terminology, undergoing a diploma recognition procedure, which might require undertaking additional studies in a university and completing an internship, passing final state exams and registration with a respec-

15 See Chapter 7, section 7.5.2.1 for more detail in this regard.

tive professional body. Neither Poland nor Bulgaria offer any facilitation with regards to access to the medical profession, which was taken as an example in both countries. This leads to several challenges for migrant workers.

Firstly, migrants that are willing to practice the profession of a doctor or a nurse cannot enter the country on the basis of a standard work permit because they cannot have their diplomas recognised and gain the right to practice while they are still in their countries of origin. Therefore, in the case of Poland, migrants often have recourse to the *Oświadczenie* procedure, and in Bulgaria - family reunification permits or other circumvention practices - in order to be able to enter the country and secure residence. Furthermore, the length and the complexity of the present procedure generally prevents migrants that wish to work in the medical profession from applying for a Blue Card. Once they have entered the country, and while they are preparing for the stages of the recognition procedure, they are bound to work in a sector and profession, which in are often in low-skilled sectors.

Secondly, the established procedures in both Bulgaria and Poland are time-consuming and have the effect of putting migrants' lives on hold for a couple of years, depending on how large the differences are between the national system and the third country. As some of the respondents pointed out, these procedures are even more challenging for migrant doctors who obtained their degrees some time ago, and were required to enrol in a university as part of the recognition procedure. Another challenge stems from the relatively high fees that are part of the recognition procedure in both countries and the requirement to undertake an unpaid internship in Poland, which engenders additional financial burdens. Finally, migrants also need to become familiar with the native language, which seems to be the least problematic criterion according to the interviewees.

All of these challenges result in two different options for migrant workers that do not involve circular migration. After investing so much time, effort and resources into the recognition procedures and learning the language, migrants are prone to settle in the country of destination upon gaining the right to practice, rather than engaging in circular migration. Furthermore, as one of the interviewees stressed, going back to their country of destination might require additional recognition procedures. An alternative option in this regard involves migrating to another Member State that has higher life standards, where all of the additional efforts would be financially rewarded. In the case of Bulgaria, the empirical data analysis suggests that migrants made this choice before commencing with the recognition procedure. In the case of Poland, some medical specialists were migrating to

other countries after being enrolled in an additional degree as part of the recognition procedure, which ultimately provided them with a diploma that would be recognised throughout the EU.

The research findings lead to the conclusion that circular migration and the recognition of qualifications in regulated professions are two incompatible processes within the current legislative and policy frameworks. The main reason is the lack of special measures, which allow the recognition process to be facilitated. They can be based on the conclusion of bilateral agreements between Member States and third countries using EU law provisions and mechanisms that are applied to the recognition of qualifications in regulated professions for EU citizens. However, in order to do that, countries like Bulgaria and Poland first need to articulate the need for such foreign specialists, both at the political level and at the level of the professional bodies that are involved in the recognition process.

This study has demonstrated that Member States attach different meanings and develop diverse approaches to circular migration in line with their national migration policies. In the case of Poland, this goes back to a time before this concept was introduced at the EU level and it is linked to the national policy, which is to facilitate already existing spontaneous patterns of circularity and to overcome the barriers to this type of migration that have been erected by EU law. In the Bulgarian case, this EU concept is used to legitimise Bulgaria's restrictive migration policy, which aims to keep migrant workers in a temporary position by sustaining the forced circulation model.

8.8. General Conclusions

The added value of this study is that it presents a comprehensive picture of the formation and implementation of the EU's circular migration approach in the Central and Eastern European context. It provides a multi-level analysis of the EU legislation that facilitates circular migration, the dynamics under the aegis of the GAMM and the implementation at the national level in two CEE countries. The originality of this study lies in the fact that it also accounts for the outcomes at the individual level by employing an empirical legal research approach. Several general conclusions can be derived from this study.

The policy idea of facilitating circular migration entered the EU's agenda more than ten years ago as part of a worldwide buzz among international organisations,

namely that this type of migration can benefit all parties involved. On the basis of several policy documents in the period 2000 – 2009, the EU formulated its approach towards circular migration. This study confirms the findings of other authors, such as Wickramasekara,[16] that this was done in the absence of any thorough evidence that this type of migration could indeed bring the claimed benefits for all parties involved. Furthermore, as the preceding chapters have demonstrated, the EU started to promote facilitation of this type of migration not only in relation to Member States but also to third countries, without a common definition or a uniform understanding of what this policy term entails.

Against this background, this study concludes that more than a decade after the EU policy makers adopted this concept, there is hardly a common approach to circular migration at the EU level. On the contrary, this is a policy notion that keeps straying in the EU Justice and Home Affairs domain and which finds a place in the Preambles of some of the legal migration directives and the Mobility Partnerships' annexes, without having clear grasp of its meaning or tangible contours. This lack of a coherent formulation leads to scattered outputs and an uneven implementation at the national level.[17]

Therefore, "catch me if you can" [18] is a suitable phrase that captures the state of the circularity of the legal and policy instruments, which are part of the EU's labour migration policy. This study demonstrated that two different concepts of circular migration can be outlined under the EU approach. On the one hand, a spontaneous pattern of circularity that can be facilitated through a legislative framework, such as to a certain extent, in the context of the Blue Card Directive as well as in the Polish simplified procedure that has been adopted the auspices of the Eastern Partnership, and as a temporary migration scheme with a re-entry component that is regulated through the Seasonal Workers' Directive and some of the circular migration initiatives which are implemented under the Mobility Partnerships with the Eastern Partnership countries.

Furthermore, the incoherent formation of the EU's approach to circular migration reflects the emerging sectorial EU labour migration policy on the one hand, and

16 P. Wickramasekara, 'Circular Migration: A Triple Win or a Dead End', Discussion Paper No. 15, The Global Union Research Network, (2011).

17 See also European Migration Network, 'Temporary and Circular Migration: empirical evidence, current policy practice and future options in EU Member States. Synthesis Report', (2011).

18 See also S. Nita, 'Circular Migration Within the EU-Moldova Mobility Partnership', in C. Solé et al. (eds.), *Impact of Circular Migration on Human, Political and Civil Rights. A Global Perspective* (Springer International Publishing, 2016), pp. 25-27.

the dynamics of the EU external migration policy under the aegis of the GAMM on the other. Therefore, coming back to the main research question of this study on how the EU's approach to circular migration has been implemented and whether it provides rights-based circularity for migrant workers in the Central and Eastern European context, the study shows that rights come at a certain "skill and qualifications" price in the EU.[19] The four sectoral directives on labour migration that were analysed differentiate migrant workers on the basis of their skills and qualifications, as well as their attractiveness for the Member States' labour markets, and use this as the decisive features, on which the different statuses are assigned.[20] The desired migrants at the EU level are the ones with higher qualifications because they are considered to contribute to the Member States and EU's economy the most. Blue Card holders are the only category that can benefit from rights-based circular migration that allows for a migrant-led trajectory. Despite that, the Blue Card Directive has hardly been used since it was adopted, due to the restrictive admission conditions, national parallel rules and the cumbersome implementation that has taken place in some Member States. Therefore, the Blue Card Directive is currently pending a recast.

Circular migration as part of the GAMM is a vivid illustration of the desire of Member States to strictly adhere to their competence under Article 79 (5) TFEU. Therefore, this study reconfirms the assessments of other authors with regards to circular migration as part of the Mobility Partnerships: behind the façade of the Mobility Partnerships' annexes which contain references to circular migration initiatives, there is nothing more than several small-scale projects and there are only a few Member States that are eager to engage in this type of migra-

19 ILO has expressed its criticism on this matter on several occations. See for instance ILO, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM(2010) 379. ILO Note based on International Labour Standards with reference to relevant regional standards, p.1, retrieved at http://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-brussels/documents/genericdocument/wcms_168539.pdf (accessed 1 May 2018). See also ILO, International Labour Conference Report 'Promoting Fair Migration' (Geneva 2016), para. 106.

20 In this regard see B. Fridriksdottir, *What Happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in Europan Union Law on Labour Migration* (PhD dissertation Radboud University Nijmegen, 2016); A. Wiesbrock, T. Jöst, and A. Desmond, 'Seasonal Workers Directive 2014/36/EU', in K. Hailbronner and D. Thym (eds.), *EU Immigration and Asylum Law. A Commentary* (Second Edition: C. H. Beck /Hart/ Nomos 2016), p. 960.

tion.[21] Apart from that, the only GAMM instrument that could currently make a difference for workers' rights is the Polish *Oświadczenie* procedure, which, as this study has demonstrated, is mainly used by the neighboring countries of Poland. The visa liberalisation with Georgia and Ukraine are other policy measures that can contribute to initiation of individual circular migration projects.

The analysis of the implementation of the EU's approach to circular migration shows that it fails to accommodate the variety of activities and migrant profiles that can have circular migration trajectories, which require flexible solutions rather than temporary migration policies that make them go round in circles. This study shows that, with the exception of Blue Card holders, such flexible solutions are only available for migrants from ethnic origin at the national level in the countries taken as case studies. Therefore, this study reconfirms the conclusions of other authors that circular migration, as a policy model, can provide for migrant-led trajectories and the protection of migrants' rights, only if it is perceived as a spontaneous pattern of migration, which is facilitated through the operation of flexible policies and a flexible legal framework (as in the case of Sweden[22] and partially through the *Oświadczenie* procedure in Poland), rather than a temporary labour migration scheme, which is redolent of the guest-worker model.[23] In line with Newland's assessment, this study concludes that the design of circular migration policies should take as their starting point the existing spontaneous patterns of migration, such as the migration between Poland and Ukraine.[24]

An added value of this study is that it goes one step further and provides a comprehensive picture of the implementation dynamics of the EU's approach to circular migration at the national level by adding an empirical legal research dimension. This study found that the results of the implementation of the EU instruments that fall under the circular migration umbrella on the rights of migrant workers

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21 See S. Carrera and R. H. i. Sagrera, 'Mobility Partnerships: 'Insecurity partnerships' for Policy Coherence and Migrant Workers' Human Rights in the EU', in R. Kunz, S. Lavenex, and M. Panizzon (eds.), *Multilayered Migration Governance: The Promise of a Partnership* (Routledge, 2011). N. Reslow, *'Partnering for mobility? Three-level Games in EU External Migration Policy'* (DPhil thesis, Maastricht University 2013); Nita, 'Circular Migration Within the EU-Moldova Mobility Partnership'.

22 This was extensively discussed in Chapters 2 and 4 respectively.

23 H. Schneider and A. Wiesbrock, 'Circular migration: A triple win situation? Wishful thinking or a serious option for suitable migration policy?', in D. Schiek, U. Liebert, and H. Schneider (eds.), *European Economic and Social Constitutionalism after the Treaty of Lisbon* (Cambridge: Cambridge University Press, 2011). R. Skeldon, 'Going Round in Circles: Circular Migration, Poverty Alleviation and Marginality', *International Migration,* 50/3 (2012).

24 K. Newland, D. R. Mendoza, and A. Terrazas, 'Learning by Doing: Experiences of Circular Migration', Migration Policy Institute, Insight, September (2008).

is not straightforward and that it depends on various factors such as the national context, how the national migration policy has developed, the way in which EU law is transposed into domestic law and how Member States use their margin of appreciation.[25]

In the Polish context, the developed entry and re-entry facilitation instruments are compensatory measures that aim to restore patterns of circular migration that were already in existence for decades. All of the established national and EU instruments were part of a conscious policy choice to create facilitation for the citizens of the neighbouring CIS countries aligned with the country's foreign policy considerations. Therefore, the implementation of the EU and national instruments falling under the circular migration umbrella has provided these migrant workers in Poland with flexible possibilities for facilitated legal entry and re-entry into the country.

In the case of Bulgaria, where labour migration is regarded as something unwanted and as a temporary solution, the concept as such did not lead to the establishment of any new rights derived from national instruments in relation to entry and re-entry conditions. Nonetheless, the different EU labour migration instruments and the visa facilitation agreements with Eastern Partnership countries have established certain rights, which need to be further developed and enforced by the different stakeholders: business organisations, NGOs and migrant workers. Currently, migrant workers cannot fully benefit from some of the rights introduced on the basis of EU law because of the fact that the directives have been cumbersomely and impractically transposed into domestic law, sometimes even in violation of EU law.

In the field of work authorisation, the EU law instruments falling under the circular migration umbrella have introduced rights for several categories of migrants with regards to the change of employer and the possibility to find alternative employment in case of unemployment. In the case of Poland, this is possible even when the EU *acquis* does not impose an obligation: under the general regime, which transposed the Single Permit Directive into Polish law. On the contrary, in the Bulgarian case these rights were established only for some categories of migrants as a result of the pressure to harmonise national law with EU requirements. Therefore, in the Bulgarian case the implementation of the EU's legal instruments has led to tangible results for the rights of migrant workers. Nevertheless, the imple-

25 On that, see also C. Solé et al., *Impact of Circular Migration on Human, Political and Civil Rights. A Global Perspective* (Springer International Publishing, 2016).

mentation dynamics presented by this study suggest that due to the poor "quality" of the transposition of EU law, these rights cannot be easily enforced in practice, which renders them somewhat ineffective.

The results of this study show that applying the minimum standards under the EU Long-term Residence Directive with regards to allowed absences for circular migration facilitation is not a workable solution and an instrument that migrant workers prefer. Furthermore, in order to transit from permits allowing circulation to a more permanent status, migrants need to change their trajectories and plan their returns to their countries of origin within the time limits that are permitted by EU and national legislation. Therefore, except for Blue Card holders who are granted flexible geographical mobility, the rest of the categories falling under the EU circular migration umbrella have not gained any additional rights which in turn make them more likely to circulate.

The policies on social security coordination and the recognition of qualifications for third-country nationals, who fall outside the scope of the EU *acquis*, are left to the Member States to determine. The analysis of these two policy fields shows that in cases where there are no EU *acquis* requirements to be implemented, Bulgaria and Poland have not been proactive due to the embryonic development of their migration policies, the lack of any demands at the political level to attract migrant workers and to create workable policies for their retention or circulation. Therefore, these policies are mainly driven by the notion to have some measures in place, rather than by incentives to create workable solutions, which would support a given policy: circular or not. Thus, they provide very limited rights to specific categories of migrants. Bulgaria sets a good example in this regard by pursuing an active policy for the negotiation of social security agreements on the basis of the GAMM framework. However, both countries fall short of investing in information campaigns and other measures that aim to raise awareness about these rights amongst migrant workers.

The implementation of the EU's family reunification policy at the national level provides for rights-based circular migration solutions only with regards to highly-skilled migrants, such as Blue Card holders, researchers and ICTs. For the rest of the migrant workers, these two policies are incompatible, unless migrant workers decide to change their migrant trajectory and settle in order to be able to satisfy the eligibility criteria for family reunification. The fact that the Family Reunification Directive allows Member States to impose addition conditions

before authorising family reunification is another hindrance to family reunification for circular migrants that are not regarded as being highly-skilled.

As Triandafyllidou stresses, on the ground circular migration is "shaped by labour market dynamics, and driven by the agency of the migrants", this does not necessarily match the EU's approach.[26] The analysis of the empirical data gathered through the conducted focus groups supports this conclusion by illustrating that migrants do not always follow the predetermined model of migration that is envisaged by policy makers. Despite the hurdles that must be overcome in order to find jobs and the restrictive policies concerning access to permanent residence or family reunification, migrant workers use their agency and rely on circumvention mechanisms, which allow them to continue with their own personal trajectories. In line with other authors' conclusions,[27] the data analysis of this study suggests that flexible policies make migrants more prone to circulation and restrictive policies lead to settlement. Furthermore, in the case of Russian and Ukrainian migrants, factors such as the political situation in their countries of origin also contribute to changes in their migration trajectories and thus provide another argument for the development of rights-based labour migration policies that allow for flexibility, rather than circular migration policies.

Another important conclusion that is based on the current implementation study is that circular migration policies concern much more than just entry and re-entry conditions. The existing policies at both the EU and the national level that are labelled as circular migration measures currently place migrant workers in a more vulnerable position. In order to distinguish the policy concept of circular migration from the guest-worker models, policy makers need to consider adopting a rights-based approach that covers other policies that concern circular migration, such as social security coordination and family reunification. Furthermore, the labour rights of such migrants need to be protected and enforced because of their vulnerable position. Even though this study did not focus on assessing the enforcement of these kinds of rights, they should nevertheless form part of any right-based circular migration policy.

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26 A. Triandafyllidou, 'Circular Migration at the Periphery of Europe: Choice, Opportunity, or Necessity?', in A. Triandafyllidou (ed.), *Circular migration between Europe and its neighbourhood : choice or necessity?* (Oxford: Oxford University Press, 2013).

27 See for instance D. S. Massey and K. A. Pren, 'Unintended consequences of US immigration policy: Explaining the post-1965 surge from Latin America', *Population and Development Review,* 38/1 (2012).

To sum up, the answer to the research question of this study on how the EU's approach to circular migration is implemented and whether it provides rights-based circularity for migrant workers in the Central and Eastern European context, is that the EU's approach has been driven by selectivity based on the skills and the qualifications of migrants and it only rewards the most desirable migrants - the highly-qualified - with the possibility to engage in rights-based circular migration. However, the circular migration approaches at the national level differ between countries due to various factors such as national context, stage of development of the national migration policy, the way in which EU law is transposed into domestic law and how Member States use their margin of appreciation. Consequently, this leads to different outcomes for the rights of migrant workers and very often to discrepancies between the predetermined models by policymakers and migrants' realities.

8.9. Policy recommendations

In line with the general conclusions of this study, the author proposes the following policy recommendations:

1. **Depart from the promotion of circular migration at the EU level and instead encourage flexible labour migration policies that allow for "geographical mobility".** As this study has demonstrated, migrant trajectories and circular migration patterns change over time due to different circumstances related, *inter alia*, to economic, political and personal factors, and are very often predetermined by cultural and historical links between home and host countries. Therefore, the development of such policies needs to follow a bottom-up approach, rather than a top-down approach from the EU level. The facilitation of this type of migration could fit the national circumstances of some Member States (e.g., Poland), but not necessarily to others. The (recast) Blue Card Directive that provides for "geographical mobility" should serve as a model for such a flexible approach to legal migration, which is rights-based rather than utilitarian as is the case for the Seasonal Workers' Directive. This approach could facilitate spontaneous circular migration, in cases where migrant workers have chosen a circular trajectory between their home and host countries, but it can also allow for a different trajectory that is related to temporary migration, settlement or migration to another country. Such an approach is also commensurate with the realities of the Member States, which

apart from labour market shortages also experience demographic problems and should be considered as part of the Legal Migration Fitness Check.

2. **Ensure better implementation and enforcement, at the national level, of the already adopted *acquis* on legal migration through the establishment of a mechanism for regular monitoring and reporting to the European Commission.** Currently, this type of monitoring is done primarily through the Commission's reports which focus on the implementation of different directives and on the basis of signals, cases and reports that are brought to its attention by Brussels-based or national based NGOs. Such a mechanism could be institutionalised through the establishment of a network of independent national experts that are funded by the EU and who report to the Commission on a regular basis, following the examples of networks such as the European network on free movement of workers within the European Union, which was coordinated by the University of Nijmegen's Centre for Migration Law and replaced by FreSco, as well as the Odysseus Network. The development of a regular monitoring mechanism is also in line with the Commission's Work Programme 2018, which puts an emphasis on better regulation, implementation and enforcement of the EU *acquis* rather than envisaging the adoption or recast of any existing legal migration legislation.[28] Furthermore, such a recommendation takes into account the attitudes of the Member States, which are currently reluctant to adopt any new proposals in this respect.[29]

3. **In the long-term, the EU institutions should depart from the emerging sectorial approach, which cannot encompass all categories of migrant workers**. The 2001 Commission proposal for a general framework directive on labour migration set a good example for flexible migration policy measures, such as permits allowing longer absences from the territory of the Member States, the export of pensions and benefits and multi-entry permits, which could also facilitate spontaneous circular migration. However, the 2001 proposal fell short of providing such flexible options in relation to low-skilled migrants. In any case, a general framework directive would provide the option to move away from the current practice that favours highly-skilled migrants with more rights and "geographical mobility" and which discriminates against low-skilled migrants, who are less attractive to the Member States.[30]

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28 European Commission, 'Commission Work Programme 2018. An agenda for a more united, stronger and more democratic Europe', COM (2017) 650 final, Strasbourg, 24.10.2017, p.13.

29 Interview # 30 with European Commission official, Belgium, November 2017.

30 Such a recommendation was also proposed by A. Wiesbrock, *Legal Migration to the European Union* (Leiden: Brill/Nijhoff, 2010), p. 734.

4. **Provide mechanisms that facilitate the recognition of qualifications for third-country nationals coming to work in regulated professions in the Member States, and which are not covered by the current EU legal framework.** This study has found that the current circular migration policies that aim to prevent a brain drain from third countries and the recognition of qualifications are two incompatible processes. The study's empirical data analysis demonstrated that this in fact leads to settlement or further migration in the EU. Therefore, the EU and the Member States need to actively pursue the conclusion of multilateral and bilateral agreements so as to regulate this issue, using the presented EU Internal Market standards as a starting point. As the IOM has suggested, they can be region-specific and field specific.[31] Another underused possibility at the national level, which requires the mutual cooperation of Member States' administrations and professional bodies, is to implement the recast Blue Card Directive, as well as the other relevant directives in this field, in such a way that it accommodates the recognition procedure for regulated professions. All of these measures, however, also need to be accompanied by reforms at the national level, which should aim to improve the current recognition procedures by making them faster and flexible on the basis of innovative compensatory measures.[32] Finally, additional policy measures, such as databases providing educational profiles in different sectors in third countries, with which the EU cooperates, could also improve this process.

   In addition, a recommendation at the EU level is to extend the personal scope of Directive 2005/36/EC, as amended by Directive 2013/55/EU, and apply it to all third-country nationals coming to work in regulated professions. The mechanism established on the basis of these directives sets out an extensive overarching framework, which provides certain procedures and safeguards.

5. **Establish family reunification policies for temporary migrants, regardless of their skill levels.** In order for migrants to engage in circular migration in a beneficial way, which as demonstrated by this study can encompass a variety of professions and durations of stay, they need to be able to rely on policies, which minimise the family disruption that is caused by such migration.[33] As this study has concluded, the implementation of the EU's family reunification policy at the national level currently provides for rights-based circular

31 IOM, 'Recognition of Qualifications and Competences of Migrants', (2013), p. 255.
32 For a list of possible compensatory measures, see ibid.
33 On that see also G. Hugo, 'What We Know About Circular Migration and Enhanced Mobility', Policy Brief No7, Migration Policy Institute, (2013), p. 7.

migration solutions only in relation to highly-skilled migrants, such as Blue Card holders, researchers and ICTs, who could also be temporary migrants staying for limited periods of time. Taking into account that the current political climate would make it impossible to justify reforms that aim to widen the personal scope of the Family Reunification Directive, Member States should establish policies that provide options for migrant workers to be accompanied by their family members. This could include frequent return options on the basis of longer permitted absences, long-term visas or temporary permits, which allow migrants to be joined temporarily by their family members as a measure which precedes the family reunification procedure. Furthermore, Member States need to provide an option for family members to be able to change their status (from visa C to D, or from visa D to a temporary permit) from inside the territory of the host country, if their sponsor decides to work for a longer period of time in the EU. As this study has shown, the lack of such measures also causes family life disruptions.

6. **Member States should proactively pursue the conclusion of bilateral agreements on social security and establish an accessible information policy for migrants that are engaged in circular migration.** This study shows that the number of such agreements, even between Member States and third countries which share cultural, economic and historical links, is rather low. Therefore, Member States should pursue the conclusion of such agreements as part of their respective migration policies and follow the practice adopted by Bulgaria, namely by using the GAMM channels in order to negotiate such agreements. Furthermore, as the analysis of the empirical data of this research has shown, migrant workers are unaware of their rights in the majority of cases, which could put them in a vulnerable position. Therefore, the Member States' administrations should pursue an active information policy, both in their territory but also, for instance, through the GAMM channels, in their home countries to inform migrant workers of the existing possibilities for export of their benefits. Furthermore, Member States should consider the option of introducing the reimbursement of social security contributions, as has been advocated by this study.

7. **If the Member States want to pursue circular migration policies, they need to start collecting data on migrants that are engaged in this type of migration and provide regular evaluations of the policies that are in place.** The UNECE' "Defining and Measuring Circular Migration" Report provides a good starting point for policy action in this regard by proposing a statistical

definition of circular migration and data sources that can be used to measure it, such as population registers, surveys and census data.[34] However, this would also require a more systematic collection of data at the national level, which could be complemented by additional surveys and further empirical research.[35] Only in this way can circular migration policies and their effects on individual level be fully evaluated and understood, as well as improved.

8. **More research is needed in order to assess whether circular migration policy models based on the facilitation of spontaneous patterns could partially remedy the current "refugee and migration crisis" by providing additional channels for legal migration.** What this study has shown, which is also commensurate with the findings of other authors, is that piloting temporary migration schemes and referring to them as "circular" does not lead to sustainable and workable policy solutions.[36] Therefore, there is a need for a shift in policy thinking in this respect.[37] Analysing the limited policy experience with the facilitation of spontaneous patterns of circular migration through legal and policy measures could be a good starting point for such a research exercise. What this study has demonstrated is that Ukrainians who were fleeing from the conflict in their home country used the Polish simplified procedure (*Oświadczenie procedure)*, rather than looking for other alternative routes to enter the country irregularly or to apply for asylum. They used this flexible possibility to support their migrant trajectory, which allowed them to settle if the conflict were to continue or to return to their home countries in case the political climate improved.

9. **New Member States, such as Bulgaria and Poland, are still developing their migration policies, and they should consider ratifying ILO Conventions Nos. 97 and 143, as well as the ICRMW.** As this study has demonstrated, Bulgaria and Poland have still not established comprehensive labour migration policies and in both case studies the developed policies did not provide adequate protection for migrant workers. Therefore, in line with the rights-based approach that has been promoted by the ILO, consistency with international standards in the field of labour migration, as is provided for in

34 Conference of European Statisticians and United Nations Economic Commission for Europe, 'Defining and Measuring Circular Migration. Final report of the Task Force on Measuring Circular Migration, U.N doc ECE/CES/BUR/2016/FEB/14/Add.1, 20 January 2016', (2016), pp. 20-26.

35 On that see also Solé et al., *Impact of Circular Migration on Human, Political and Civil Rights. A Global Perspective*.

36 See Chapter 2, section 2.6.

37 In this respect, see also K. Newland and D. Agunias, 'How can Circuar migration and Sustainable Return Serve as Development tools? Background paper for Roundtable 1.4, GFMD, Brussels, (2007).

ILO Conventions Nos. 97 and 143, as well as the ICRMW, can support new countries of immigration, such as the ones under consideration in this research, to establish policy measures that are conducive to managing labour migration and which ensure an adequate level of protection for migrant workers.[38]

38 See Chapter 3 for details in this regard.

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Annexes

Annex I: Interviews with officials from EU institutions, representatives of Brussels-based NGOs, think-tanks and international organisations in the period 2013-2017

N	Date	Type of stake-holder	Institution	Country	Gender	Interview
1	30.01.2013	Expert/ Head of Programme x 2	Think-thank	Belgium	M/F	In person
2	11.02.2013	Official	European Com-mission	Belgium	F	In person
3	11.02.2013	Director	Trade Union	Belgium	F	(phone)
4	5.02.2013	Deputy-director	Think-thank	Belgium	F	In person
5	13.02.2013	Policy officer	NGO	Belgium	F	In person
6	19.02.2013	Head of Pro-gramme	Think-thank	Belgium	M	In person
7	20.02.2013	Director	Think-thank	Belgium	M	In person
8	22.02.2013	Official	EU Council	Belgium	M	In person
9	22.02.2013	Official	European Com-mission	Belgium	M	In person
10	24.05.2013	Representative	Trade Union	Belgium	M	In person
11	27.05.2013	Official	European Com-mission	Belgium	M	In person
12	30.05.2013	Academic	University	Italy	F	(skype interview)
13	03.06.2013	Representative	Think-thank	Belgium	F	In person
14	7.08.2013	Former policy officer	Think-thank	Belgium	F	In person
15	07.08.2013	Representative	International organisation	Belgium	F	In person
16	10.2013	Representative	International organisation	Switzerland	M	In person
17	07.04.2014	Representative	International organisation	Switzerland	F	In person

18	27.11.2014	State Official	Council of Ministers	Georgia	M	In person
19	24.02.2017	Representative	International organisation	Belgium	M	In person
20	27.02.2017	Representative	International organisation	Armenia	M	skype
21	6.03.2017	Representative	International organisation	Austria	M	In person
22	14.03.2017	Representative	International organisation	Austria	M	In person
23	20.03.2017	Representative	International organisation	Austria	M	In person
24	27.03.2017	Former MP project assistant	International NGO	Georgia	F	skype
25	27.03.2017	Coordinator of the MP with Georgia	Council of Ministers	Georgia	F	Skype
26	28.03.2017	Representatives x2	International organisation	Belarus	F/M	Skype
27	28.03.2017	Representative	International organisation	Austria	M	In person
28	29.03.2017	Representative	International organisation	Austria	F	In person
29	25.05.2017	Official	European Commission	Belgium	M	In person
30	16.11.2017	Official	European Commission	Belgium	M	In person

Annex II: Interviews with stakeholders in Poland in the period October – December 2016

N	**Date**	**Type of stakeholder**	**Country**	**Institutional level**	**Gender**	**Interview**
1	4.11.16	Officials x 3	Poland	Ministry	F	In person
2	3.11.16	Academic	Poland	Higher education organisation	F	In person
3	16.11.16	Civil society actor	Poland	NGO	F	In person
4	15.12.16	Expert	Poland	International organisation/ NGO	M	In person
5	10.11.16	Civil society actor	Poland	NGO	F	In person

6	24.11.16	Civil society actor/lawyer x 2	Poland	NGO	M/F	In person
7	25.11.16	Official	Poland	Local authority (Labour office)	M	In person
8	25.11.16	Official	Poland	Border guard	M	In person
9	25.11.16	Employer/ Owner	Poland	Agriculture business	M	Phone
10	25.10.16	Staff member/ PR	Poland	Private recruitment agency	M	In person
11	15.11.16	Chairman	Poland	Trade union	M	In person
12	15.11.16	Civil society actor/academic	Poland	NGO/ Higher education organisation	M	In person
13	18.11.16	Expert	Poland	NGO	F	In person
14	22.11.16	Advisor	Poland	Ministry	F	In person
15	8.11.16	Academic	Poland	Higher education organisation	M	In person
16	19.12.16	Official	Poland	Ministry	F	Via e-mail
17	16.11.16	Official	Poland	Office of foreigners	F	In person
18	23.11.16	Official	Poland	Ministry	M	In person
19	18.11.16	Official	Poland	Ministry	F	In person
20	16.12.16	Lawyer	Poland	Professional body	M	In person
21	30.11.16	Lawyer/PR	Poland	Professional body	M	In person
22	7.12.16	Management representatives x 4	Poland	Business/IT company	M/M/ F/F	In person

Annex III: Interviews with stakeholders in Bulgaria in the period June 2016 – January 2017

N	Date	Type of stakeholder	Country	Institutional level	Gender	Interview
1	13.07.16	Official	Bulgaria	Ministry	M	In person
2	22.07.16	Official	Bulgaria	Ministry	M	In person
3	22.07.16	Representative/ Official	Bulgaria	NCID	M	In person
4	14.07.16	Official	Bulgaria	Ministry	F	In person

5	14.07.16	Representatives x 3	Bulgaria	Trade Union	F	In person
6	3.08.16	Representative	Bulgaria	Employers' organisation	M	In person
7	22.07.16	Academic	Bulgaria	University	F	In person
8	11.07.16	Lawyer	Bulgaria	NGO	F	In person
9	21.07.16	Lawyer	Bulgaria	NGO	F	In person
10	8.07.16	Officials x 3	Bulgaria	Ministry	F	In person
11	4.01.17	Representative	Bulgaria	Employers' organisation in tourism sector	M	In person
12	26.06.16	Lawyer/representative	Bulgaria	International organisation	M	In person
13	1.10.16	Official	Bulgaria	Ministry	F	Via e-mail
14	6.07.16	Advisor/Expert	Bulgaria	Council of Ministers/ Political cabinet member	M	In person
15	4.11.16	Official	Bulgaria	National Insurance Institute	F	In person
16	14.10.16	Expert	Bulgaria	Employers' organisation	F	Via e-mail
17	27.09.16	Official	Bulgaria	Ministry	F	In person
18	30.09.16	Representatives	Bulgaria	IT company	M/F	In person
19	28.09.16	Foreign Employer	Bulgaria	Business	F	In person
20	20.12.16	Representatives (follow up interview of # 18)	Bulgaria	IT company	M/F	In person
21	3.01.17	Representative	Bulgaria	Bulgarian Medical Association/ Professional body	F	In person
22	6.10.17	Representative (follow up interview #11)	Bulgaria	Employers' organisation in the tourism sector	M	Phone
23	6.10.17	Seasonal workers Recruiter in the tourism sector	Bulgaria	Recruitment company	M	Phone

Annex IV: Focus groups in Bulgaria and Poland

Bulgaria	Number of participants	Nationality	Gender	Skill level	Working status
General focus group, 1 October 2016	5	Ukrainians/1 Russian (who wanted to be included in this groups)	4 F/1 M	Mixed: Highly skilled/ Middle-level skilled	4 Workers 1 Retiree
General focus group, 1 October 2016	5	Russians	4 F/1 M	Mostly Highly skilled	2 Workers 2 family members of foreigners from Bulgarian origin 1 Retiree
Focus group with Blue Card holders, 30 September 2016	4	Russians	1 F/3 M	Highly skilled	Workers
Focus group with Blue Card holders, 30 September 2016	3	Ukrainians	1 F/2 M	Highly skilled	Workers

Poland	Number of participants	Nationality	Gender	Skill level	Working status
General focus group, 19 November 2016	5	Ukrainians	3 F/2 M	Mixed: Highly skilled/ Middle-level skilled/ Low skilled	5 Workers
General focus group, 19 November 2016	6	Russians	5 F/1 M	Mostly Highly skilled	6 Workers
Focus group with Blue Card holders, 6 December 2016	8	Mixed: Russians/ Ukrainians/ Kazakhstan	8 M	Highly skilled	8 Workers
Focus group with Blue Card holders, 8 December 2016	5	Russians	2 F/3 M	Highly skilled	5 Workers
Focus group with Blue Card holders, 8 December 2016	6	Ukrainians	2 F/4 M	Highly skilled	6 Workers 1 applicant for a Blue Card

Policy area to be addressed with circular migration	International standards	Benchmarks	Instrument/action to implement benchmark
Entry conditions	No general international law provisions. Admission is national prerogative of states.	-	-
Re-entry conditions	UDHR, Art. 13 ICCPR, Art. 12 ICRMW, Art. 8 ECHR Protocol No. 4, Art. 2(2) and 3(2)	Right to return to his or her own country and leave any country, including one's own country of origin.	Permits allowing periods of absence from the territory of the country of destination for long–term residents TCNs going to their home country (also applicable to residence status)
	European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe, Art. 1	Facilitated personal travel of nationals of the contracting parties on the basis of 3 month visa	Multiple entry visas and/or visa free regime
	European Convention on Establishment, Art. 1	Facilitate the entry into the territory of the contracting parties for the purpose of temporary visits.	
	ILO Multilateral Framework on Labour Migration, Principle 15, Guideline 15.8	Adopting policies to encourage circular and return migration and reintegration into the country of origin, including by promoting temporary labour migration schemes and circulation-friendly visa policies.	
	ICRMW, Art. 59 (2)	The State of employment shall, subject to paragraph 1 of the present article, **consider** granting seasonal workers who have been employed in its territory for a significant period of time the possibility of taking up other remunerated activities and giving them priority over other workers who seek admission to that State, subject to applicable bilateral and multilateral agreements.	
	EU Directive 2004/38, Article 4 and 5 EU Charter, Article 45	The right to leave and enter the territory of a Member State; free movement between Member States.	
	EU Directive 2004/38/EC, Article 16 (4)	Right of permanent residence can be lost only through absence from the host Member State for a period exceeding two consecutive years.	

Policy area to be addressed with circular migration	International standards	Benchmarks	Instrument/action to implement benchmark
Work permit	ECMW, Article 8(2) ILO Migrant Workers Convention (143), Art. 14 (a) ICRMW, Art. 52 (3a)	Access to employment in all industries and occupations with max. restriction of 1 or 2 years (with some limitations provided in the law).	Flexible work permits, allowing change of both sector and employer within the period of their validity (See ILO's Committee of Experts on the Application of Conventions and Recommendations/ GCIM Recommendation)
	Regulation 492/2011, Article 7 (1)	Free access to employment in all industries and occupations	
	ICRMW, Art. 59 (2)	Contracting states shall consider granting seasonal workers who have already been employed in their territory for a significant period of time the possibility of taking up other remunerated activities	
	ILO Convention No. 143, Art. 8 (a) ICRMW, Art. 49 (2)	Loss or termination of employment should not constitute a sole ground for withdrawal of migrant worker's authorization of residence or work permit	
	ILO Convention No. 143, Art. 8 (b) ICRMW, Art. 49 (3); Art. 51	Possibility to find alternative work in case of loss or termination of employment	
	EU Directive 2004/38/EC, Article 7 (3)	Possibility for involuntarily unemployed job seekers to enjoy residence right during the period in which they seek employment	
Residence status	ICCPR, Art. 12 (1), ICRMW, Art. 39, ECHR, Art. 2 (1) of the Fourth Protocol	Right to free movement and choice of residence within the country, where one is lawfully resident	Permits allowing transit from temporary status to permanent residence rights (and thus path to citizenship)
	European Convention on Establishment, Art. 2	Contracting parties shall facilitate the prolonged or permanent residence of nationals of the other parties in its territory.	
	EU Directive 2004/38/EC, Article 16 (1)	EU citizens who have resided legally for a continuous period of five years in the host Member State have the right of permanent residence in this country.	

Policy area to be addressed with circular migration	International standards	Benchmarks	Instrument/action to implement benchmark
Social security, pension and healthcare benefits	European Convention on Social Security, Art. 2		- bilateral social security agreements ILO Convention on Social Equality of Treatment, Art. 8 Maintenance of Social Security Rights Recommendation (No. 167) European Code of Social Security, Art. 73 European Social Charter and the (Revised) European Social Charter, Art. 12 -multilateral agreements ILO Convention on Social Equality of Treatment, Art. 8 European Code of Social Security, Art. 73 European Social Charter and the (Revised) European Social Charter, Art. 12
	European Convention on Social Security, Art. 2 Maintenance of the Social Security Rights Convention No. 157		
	ILO Convention on Social Equality of Treatment Convention (No. 118), Art. 5 European Convention on Social Security, Art. 2	Possibility to export: Old-age pensions and benefits	
	Equality of Treatment (Accident Compensation) Convention (No. 19), Art. 1 ILO Convention on Social Equality of Treatment Convention (No. 118), Art. 5	Benefits covering accidents -Invalidity benefits, Benefits in respect of accidents at work and occupational diseases, Survivors' benefits	
	European Convention on Social Security, Art. 2 Maintenance of the Social Security Rights Convention (No. 157), Art.2 Maintenance of Social Security Rights Recommendation (No. 167) ILO Convention on Social Equality of Treatment, Art. 7 (2)	Maintenance of the acquired rights and rights in course of acquisition under their legislation.	
	Migration for Employment Convention (No. 97), Art. 6 (b) European Code of Social Security, Art. 73 Regulation No 883/2004, Title I and II	Determination of applicable legislation, equality of treatment, principle of assimilation (or equal treatment of facts and events), principle of aggregation of insurance periods and principle of export of benefits	
	ILO Convention on Social Equality of Treatment, Art. 7 (2) Article 9(1) of ILO Convention No. 143	Totalisation of periods of insurance, employment or residence and of assimilated periods for the purpose of the acquisition, maintenance or recovery of rights and for the calculation of benefits.	
	ICRMW in Article 27 (2)	Reimbursement of social security contributions	

Policy area to be addressed with circular migration	International standards	Benchmarks	Instrument/action to implement benchmark
Entry and re-entry of family members	CRC, Art. 10(1) ICRMW, Art. 44 (2) ILO Convention No. 143, Art. 13(1) ILO Migrant Worker Recommendation No. 151 (Revised) European Social Charter, 1996, Art.19(6)	Obligation to facilitate family reunion	Waiting period for family reunification shall not exceed twelve months. ECMW, Art.12 ESC; Report of the Commitee
	ILO (1997) Guidelines on Special Protective Measures for Migrant Workers in Time-bound Activities	Family reunion of seasonal migrants and "special purpose workers" who are legally resident in the country	A requirement for suitable housing should not be so restrictive as to prevent family reunification. ILO Migrant Worker Recommendation No. 151
	EU Charter, Article 7	Right to respect and protection of the family Free movement for family members	
	Directive 2004/38, Article 3 Article 7 (1) d	Right to residence	

Policy area to be addressed with circular migration	International standards	Benchmarks	Instrument/action to implement benchmark
Recognition of qualifications	ILO Convention No. 143, Art. 14 ILO Recommendation No. 151, Paragraph 6	Members may after appropriate consultation with the representatives organizations of employers and workers, make regulations concerning recognition of occupational qualifications acquired outside its territory, including certificates and diplomas	International cooperation for recognition of qualifications both in countries of origin and destination (academic and professional qualifications, non-formal and informal learning)
	ILO Multilateral Framework on Labour Migration. Non-binding principles and guidelines for a rights-based approach to labour migration, 2006, Guideline 12.6	Recognition and accreditation of migrant workers' skills and qualifications and, where that is not possible, providing a means to have their skills and qualifications recognized	Measures to assist migrant workers and their families on the occasion of their final return to their State of origin - information about equivalence accorded to occupational qualifications obtained abroad and any tests to be passed to secure their official recognition; equivalence accorded to educational qualifications, so that migrant workers' children can be admitted to schools without down-grading. (European Convention on the Legal Status of Migrant Workers, Art. 30)
	Directive 2005/36/EC (Chapter, I, II and III)	Providing for rules for the mutual recognition of professional qualifications regarding regulated professions.	
	Convention on the Recognition of Qualifications concerning Higher Education in the European Region	Holders of qualifications issued in one country shall have adequate access to an assessment of these qualifications in another country	
	Article III.1	The responsibility to demonstrate that an application does not fulfil the relevant requirements lies with the body undertaking the assessment	All countries are required to establish a national information centre, offering advice on the recognition of foreign qualifications to parties or persons (Article IX.2)
	Article III.3 (2)		
	Section 4, 5 and 6	Each party is required to generally recognise qualifications in regards to access to higher education, periods of study within the framework of another higher education programme or higher education degrees as similar to the corresponding qualifications in its own system, unless it can show that there are substantial differences between its own qualifications and the qualifications for which recognition is sought.	Qualification frameworks provide for the positioning of a certain qualification in the grid of qualifications and thus facilitate recognition by supporting comparability and clarifying the learning outcomes contained n foreign degrees. (Bologna process) European Credit Transfer and Accumulation System (ECTS) aims to facilitate recognition of study periods and degrees based on credits in line with the Lisbon Recognition Convention. (Bologna process)

Summary

The policy idea of facilitating circular migration entered the EU's agenda more than a decade ago as part of a worldwide buzz among international organisations, namely that this type of migration could provide a "triple win solution" that would benefit all: the countries of origin and destination, as well as the migrant workers themselves. It is understood as a way of allowing migrants some degree of legal mobility back and forth between two countries.[1] Despite the great policy and scholarly attention that has been paid to this concept, however, little is known about the implementation challenges of such policies and their consequences for the rights of migrant workers. The aim of this study is to contribute to filling this gap by assessing the implementation of EU policies and legal instruments that are designed to foster circular migration and how they affect migrant workers' rights in the context of circularity.

In order to answer the question of how the EU's circular migration approach has been implemented and what the consequences are for the rights of migrant workers, this PhD dissertation combines international, European and national law and implementation evaluation as part of an empirical legal research study.[2] Tracing the implementation of the EU's approach to circular migration requires a three level analysis – policy formulation at the EU (and national) level, policy outputs developed at the EU and national level and policy outcomes measured at the individual level.

Addressing the need to examine the policy outputs developed at the EU and national level, this PhD study employs a comparative case study methodology. It focuses geographically on the Eastern neighbourhood, which comprises countries in Central and Eastern Europe (CEE) that attract migrant workers from the former Soviet Union republics. This region is an interesting case for research because it is understudied both in terms of issues related to legislation and policy of these new countries of immigration, as well as in terms of implementation of the EU's

1 European Commission, 'Communication on circular migration and mobility partnerships between the European Union and third countries', COM (2007) 248 final, Brussels, 16 May 2007, p. 8.

2 See F. L. Leeuw and H. Schmeets, *Empirical Legal Research. A Guidance Book for Lawyers, Legislators and Regulators* (Edward Elgar Publishing 2016), p. 6; p. 35.

circular migration at the national level. Furthermore, the CEE currently comprises both EU and non-EU countries and is characterised by increasing cross-border migration, especially after the latest EU enlargement.

In order to be able to draw conclusions about the policy outcomes that arise from the implementation of the various migration instruments which fall under the circular migration umbrella at the national level, this PhD study applies legal empirical research methods, such as semi-structured interviews and focus groups. In this way, it highlights the consequences for the rights of migrant workers as a result of the application of different policy options.

The literature review conducted as part of Chapter 1 of this study reveals some of the key characteristics of circular migration: it is legal labour migration occurring through legal channels; it is repeated migration, involving more than one outward movement and return and it is temporary migration encompassing both temporary and long-term stays. Since the official discourse at the EU level is to foster this type of migration, this study tackles the key policy areas that must be addressed with this type of migration. It distinguishes between two types of policy areas: essential ones that enable migrants to circulate - such as entry and re-entry conditions, work authorisation and residence status, as well as the "circulation" of social security contributions; and secondary ones that can influence the willingness of migrants to engage in circular migration, namely the possibility for circular migrants to bring their family members with them during their periods of stay in the country of destination and to have their qualifications recognised. These are also policy areas that are considered to be problematic in terms of the previous experience with temporary (guest-worker) and circular migration policies (Chapter 2).

Chapter 3 develops a benchmark framework[3] to assess whether these policy areas provide a "win" for the migrant worker within the context of the "triple win solution" that circular migration ostensibly offers. The premises thereof are firstly, whether the migrant has a certain degree of voluntarism and "free" movement or generally a free choice in the decision to migrate. This condition differentiates circular migration policies from general time-bound migration policies that are redolent of the guest-worker models. Secondly, what needs to be assessed is whether these policies provide adequate protection of the migrant workers' fundamental rights and rights that allow them to benefit from the circulation, such as

3 The English Oxford Dictionary defines "benchmark" as "a standard or point of reference against which things may be compared".

the export of social security benefits when they return back home and provisions to ensure that their qualifications can be recognised.

In line with these premises, this chapter proposes a two-level benchmark framework for the assessment of circular migration policies. On the first level, standards developed at the international and at the European level in the field of human rights, migration, labour and social security law are identified as possible benchmarks in the study's key policy areas. Secondly, the proposed benchmark framework includes policy instruments that can help in the implementation of these benchmarks. They are identified as being conducive to circular migration management on the basis of a literature review of the lessons that have been learned from the application of similar time-bound labour migration policies, such as the experience with the guest-worker schemes, as well as good practices that have been identified from among the emerging new generation of circular migration programmes that were presented in Chapter 2.

This dissertation examines what has been achieved in relation to the two categories of circular labour migration which are relevant in the EU context: temporary engagement of EU settled third-country nationals returning to their countries of origin, and temporary opportunities for entry and re-entry for persons residing in a third country for the purposes of working in the EU.[4] These two categories of circular migration are to be facilitated at the European level on the basis of a twofold approach. Firstly, the Commission planned to promote it on the basis of a legislative framework: by using existing legal migration instruments and introducing special measures in future legislative acts. This part of the approach to circular migration encompasses the sectorial legal migration framework that has already been promulgated at the EU level and which regulates the conditions of entry and residence for different categories of immigrants in line with the Blue Card Directive,[5] the Seasonal Workers' Directive,[6] the Single Permit Directive,[7]

4 European Commission, 'Communication on circular migration and mobility partnerships between the European Union and third countries', COM (2007) 248 final, Brussels, 16 May 2007, p. 8-9.

5 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/17.

6 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94.

7 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member [2011] OJ L 343.

the Intra-corporate Transferee's Directive,[8] the Students' and Researchers' Directive,[9] as well as the Long-term Residence Directive. [10]

Secondly, it has been incorporated as a policy instrument within the context of the Global Approach to Migration and Mobility (GAMM), which is the overarching framework for the EU external migration and asylum policy. The European Commission has planned to facilitate the development of circular migration schemes with third countries within the framework of the GAMM, which does not limit the spectrum of migrant categories that can participate in such initiatives. In order to analyse the whole spectrum of economically active migrants that can engage in circular migration, this dissertation focuses on both low-skilled (e.g., seasonal) and highly-skilled migrants (e.g., Blue Card holders, researchers, intra-corporate transferees), as well as migrants that possess a more permanent status which is commensurate with the aim of the European Commission to facilitate temporary engagement of EU settled third-country nationals returning to their countries of origin.

This study concludes that more than a decade after the EU policy makers adopted this concept, there is hardly a common approach to circular migration at the EU level. On the contrary, this is a policy notion that keeps straying in the EU Justice and Home Affairs domain and which finds a place in the Preambles of some of the legal migration directives and in the Mobility Partnerships' annexes, without having clear grasp of its meaning or tangible contours. This lack of a coherent formulation, as well as a common definition or a uniform understanding of what this policy term entails, leads to scattered outputs and an uneven implementation at the national level.[11]

This study demonstrates that two different concepts of circular migration can be discerned from the EU's approach. On the one hand, there is a spontaneous pattern of circularity that can be facilitated through a legislative framework, such

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8 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L 16.

9 Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing [2016] OJ L 132.

10 Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L 157.

11 See also European Migration Network, 'Temporary and Circular Migration: empirical evidence, current policy practice and future options in EU Member States. Synthesis Report', (2011).

as to a certain extent, in the context of the Blue Card Directive as well as in the Polish *Oświadczenie* procedure (see Chapter 6) that has been adopted under the auspices of the Eastern Partnership, and as a temporary migration scheme with a re-entry component that is regulated through the Seasonal Workers' Directive and some of the circular migration initiatives which are implemented under the Mobility Partnerships with the Eastern Partnership countries.

Furthermore, the incoherent formation of the EU's approach to circular migration reflects the emerging sectorial EU labour migration policy on the one hand, and the dynamics of the EU external migration policy under the aegis of the GAMM on the other. Therefore, coming back to the main research question of this study on how the EU's approach to circular migration has been implemented and whether it provides rights-based circularity for migrant workers in the Central and Eastern European context, the study shows that rights come at a certain "skill and qualifications" price in the EU. The four sectorial directives on labour migration that were analysed in Chapter 5 (Blue Card Directive, the Seasonal Workers' Directive, the Intra-corporate Transferee's Directive, and the Students' and Researchers' Directive) differentiate migrant workers on the basis of their skills and qualifications, as well as their attractiveness for the Member States' labour markets, and use these as the decisive features, on which the different statuses are assigned.[12] The desired migrants at the EU level are the ones with higher qualifications because they are considered to contribute to the Member States and EU's economy the most. Blue Card holders are the only category that can benefit from rights-based circular migration that allows for a migrant-led trajectory. Despite that, the Blue Card Directive has hardly been used since it was adopted, due to the restrictive admission conditions, national parallel rules and the cumbersome implementation that has taken place in some Member States. As a result of this, the Blue Card Directive is currently pending a recast.

Circular migration as part of the GAMM is a vivid illustration of the desire of Member States to strictly adhere to their competence under Article 79 (5) TFEU. Therefore, this study reconfirms the assessments of other authors with regards to circular migration as part of the Mobility Partnerships: behind the façade of the Mobility Partnerships' annexes which contain reference to circular migration initiatives, there is nothing more than several small-scale projects and there

12 In this regard see B. Fridriksdottir, *What Happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in Europan Union Law on Labour Migration* (PhD dissertation Radboud University Nijmegen, 2016); A. Wiesbrock, T. Jöst, and A. Desmond, 'Seasonal Workers Directive 2014/36/EU', in K. Hailbronner and D. Thym (eds.), *EU Immigration and Asylum Law. A Commentary* (Second Edition edn.: C. H. Beck /Hart/ Nomos 2016), p. 960.

are only a few Member States that are eager to engage in this type of migration (Chapter 4).[13] Apart from that, the only GAMM instrument that could currently make a difference for workers' rights is the Polish *Oświadczenie* procedure, which, as this study has demonstrated, is mainly used by the neighbouring countries of Poland (Chapter 6). The visa liberalisation with Georgia and Ukraine are other policy measures that can contribute to the initiation of individual circular migration projects.

The analysis of the implementation of the EU's approach to circular migration shows that it fails to accommodate the variety of activities and migrant profiles that can have circular migration trajectories, which require flexible solutions rather than temporary migration policies that make them go round in circles. This study shows that, with the exception of Blue Card holders, such flexible solutions are only available for migrants that possess a specific ethnic origin at the national level in the countries that were taken as case studies. Therefore, this study reconfirms the conclusions of other authors that circular migration, as a policy model, can provide for migrant-led trajectories and the protection of migrants' rights, only if it is perceived as a spontaneous pattern of migration, which is facilitated through the operation of flexible policies and a flexible legal framework (as in the case of Sweden[14]and partially through the *Oświadczenie* procedure in Poland), rather than a temporary labour migration scheme, which is redolent of the guest-worker model.[15] This study concludes that the design of circular migration policies should take as their starting point, the existing spontaneous patterns of migration, such as the migration between Poland and Ukraine.[16]

An added value of this study is that it goes one step further and provides a comprehensive picture of the implementation dynamics of the EU's approach to circular migration at the national level by adding an empirical legal research dimension.

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13 See S. Carrera and R. H. i. Sagrera, 'Mobility Partnerships: 'Insecurity partnerships' for Policy Coherence and Migrant Workers' Human Rights in the EU', in R. Kunz, S. Lavenex, and M. Panizzon (eds.), *Multilayered Migration Governance: The Promise of a Partnership* (Routledge, 2011). N. Reslow, *'Partnering for mobility? Three-level Games in EU External Migration Policy'* (DPhil thesis, Maastricht University 2013); Nita, 'Circular Migration Within the EU-Moldova Mobility Partnership'.

14 This was extensively discussed in Chapters 2 and 4 respectively.

15 H. Schneider and A. Wiesbrock, 'Circular migration: A triple win situation? Wishful thinking or a serious option for suitable migration policy?', in D. Schiek, U. Liebert, and H. Schneider (eds.), *European Economic and Social Constitutionalism after the Treaty of Lisbon* (Cambridge: Cambridge University Press, 2011). R. Skeldon, 'Going Round in Circles: Circular Migration, Poverty Alleviation and Marginality', *International Migration,* 50/3 (2012).

16 On that, see also K. Newland, D. R. Mendoza, and A. Terrazas, 'Learning by Doing: Experiences of Circular Migration', Migration Policy Institute, Insight, September (2008).

This study found that the results of the implementation of the EU instruments that fall under the circular migration umbrella on the rights of migrant workers is not straightforward and that it depends on various factors such as the national context, how the national migration policy has developed, the way in which EU law is transposed into domestic law and how Member States use their margin of appreciation.[17]

In the Polish context, the developed entry and re-entry facilitation instruments are compensatory measures that aim to restore the patterns of circular migration that were already in existence for decades (Chapter 6). All of the established national and EU instruments were part of a conscious policy choice to create facilitation for the citizens of the neighbouring CIS countries aligned with the country's foreign policy considerations. Therefore, the implementation of the EU and national instruments falling under the circular migration umbrella has provided these migrant workers in Poland with flexible possibilities for facilitated legal entry and re-entry into the country.

In the case of Bulgaria, where labour migration is regarded as something unwanted and as a temporary solution, the concept as such did not lead to the establishment of any new rights derived from national instruments in relation to entry and re-entry conditions (Chapter 7). Nonetheless, the different EU labour migration instruments and the visa facilitation agreements with Eastern Partnership countries have established certain rights, which need to be further developed and enforced by the different stakeholders: business organisations, NGOs and migrant workers. Currently, migrant workers cannot fully benefit from some of the rights introduced on the basis of EU law because of the fact that the directives have been cumbersomely and impractically transposed into domestic law, sometimes even in violation of EU law.

In the field of work authorisation, the EU law instruments falling under the circular migration umbrella have introduced rights for several categories of migrants with regards to the change of employer and the possibility to find alternative employment in case of unemployment. In the case of Poland, this is possible even when the EU *acquis* does not impose an obligation: under the general regime, which transposed the Single Permit Directive into Polish law. On the contrary, in the Bulgarian case these rights were established only for some categories of migrants as a result of the pressure to harmonise national law with EU requirements. There-

17 On that, see also C. Solé et al., *Impact of Circular Migration on Human, Political and Civil Rights. A Global Perspective* (Springer International Publishing, 2016).

fore, in the Bulgarian case, the implementation of the EU's legal instruments has led to tangible results for the rights of migrant workers. Nevertheless, the implementation dynamics presented by this study suggest that due to the poor "quality" of the transposition of EU law, these rights cannot be easily enforced in practice, which renders them somewhat ineffective.

The results of this study show that applying the minimum standards under the EU Long-term Residence Directive with regards to allowed absences for circular migration facilitation is not a workable solution and an instrument that migrant workers actually prefer. Furthermore, in order to transit from permits allowing circulation to a more permanent status, migrants need to change their trajectories and plan their return to their countries of origin within the time limits specified by EU and national legislation. Therefore, with the exception of Blue Card holders who are granted flexible geographical mobility, the rest of the categories falling under the EU circular migration umbrella have not gained any additional rights, which in turn makes them more likely to circulate.

The policies on social security coordination and the recognition of qualifications for third-country nationals, who fall outside the scope of the EU *acquis*, are left to the Member States to determine. The analysis of these two policy fields shows that in cases where there are no EU *acquis* requirements to be implemented, Bulgaria and Poland have not been proactive due to the embryonic development of their migration policies, the lack of any demands at the political level to attract migrant workers and to create workable policies for their retention or circulation. Therefore, these policies are mainly driven by the notion to have some measures in place, rather than by incentives to create workable solutions, which would support a given policy: circular or not. Thus, they provide very limited rights to specific categories of migrants. Bulgaria sets a good example in this regard by pursuing an active policy for the negotiation of social security agreements on the basis of the GAMM framework. However, both countries fall short of investing in information campaigns and other measures that aim to raise awareness about these rights amongst migrant workers.

The implementation of the EU's family reunification policy at the national level provides for rights-based circular migration solutions only with regards to highly-skilled migrants, such as Blue Card holders, researchers and ICTs. For the rest of the migrant workers, these two policies are incompatible, unless migrant workers decide to change their migrant trajectory and settle in order to be able to satisfy the eligibility criteria for family reunification. The fact that the Family

Reunification Directive allows Member States to impose addition conditions before authorising family reunification is another hindrance to family reunification for circular migrants that are not regarded as highly-skilled.

As Triandafyllidou stresses, on the ground circular migration is "shaped by labour market dynamics, and driven by the agency of the migrants", and this does not necessarily match the EU's approach.[18] The analysis of the empirical data gathered through the conducted focus groups supports this conclusion by illustrating that migrants do not always follow the predetermined model of migration that is envisaged by policy makers. Despite the hurdles that must be overcome in order to find jobs and the restrictive policies concerning access to permanent residence or family reunification, migrant workers use their agency and rely on circumvention mechanisms, which allow them to continue with their own personal trajectories. In line with other authors' conclusions,[19] the data analysis of this study suggests that flexible policies make migrants more prone to circulation and restrictive policies lead to settlement. Furthermore, in the case of Russian and Ukrainian migrants, factors such as the political situation in their countries of origin also contribute to changes in their migration trajectories and thus provide another argument for the development of rights-based labour migration policies that allow for flexibility, rather than circular migration policies.

Another important conclusion that is based on the current implementation study is that circular migration policies concern much more than just entry and re-entry conditions. The existing policies at both the EU and the national level that are labelled as circular migration measures currently place migrant workers in a more vulnerable position. In order to distinguish the policy concept of circular migration from the guest-worker models, policy makers need to consider adopting a rights-based approach that covers other policies that relate to circular migration, such as social security coordination and family reunification. Furthermore, the labour rights of such migrants need to be protected and enforced because of their vulnerable position. Even though this study did not focus on assessing the enforcement of these kinds of rights, they should nevertheless form part of any rights-based circular migration policy.

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18 A. Triandafyllidou, 'Circular Migration at the Periphery of Europe: Choice, Opportunity, or Necessity?', in A. Triandafyllidou (ed.), *Circular migration between Europe and its neighbourhood : choice or necessity?* (Oxford: Oxford University Press, 2013).

19 See for instance D. S. Massey and K. A. Pren, 'Unintended consequences of US immigration policy: Explaining the post-1965 surge from Latin America', *Population and Development Review,* 38/1 (2012).

To sum up, the answer to the research question of this study on how the EU's approach to circular migration is implemented and whether it provides rights-based circularity for migrant workers in the Central and Eastern European context, is that the EU's approach has been driven by selectivity based on the skills and the qualifications of migrants and it only allows the most desirable migrants - the highly-qualified - with the possibility to engage in rights-based circular migration. However, the circular migration approaches at the national level differ between countries due to various factors such as the national context, stage of development of the national migration policy, the way in which EU law is transposed into domestic law and how Member States use their margin of appreciation. Consequently, this leads to different outcomes for the rights of migrant workers and very often to discrepancies between the predetermined models by policymakers and the migrants' realities.

Valorisation addendum

1. Societal relevance of the research and findings

This PhD research is not only academically interesting but also policy-relevant. The concept of circular migration has been on the agenda of international organisations and the EU for more than 15 years and is currently part of the Global Compact for Migration,[20] as well as the Legal Migration Fitness Check evaluation of the European Commission.[21] The societal relevance of this study is that it contributes to the understanding of the meaning of this concept in general, in the EU context, as well as more specifically with regards to the Eastern neighbourhood. It sheds light on the different legal and policy instruments that have been adopted to implement circular migration policies and their consequences for the rights of migrant workers. Therefore, the study has the potential to improve the treatment of migrant workers and reform migration policy models in line with the international standards, such as those promoted by the ILO. Furthermore, it provides a new approach for the assessment of such policies on the basis of the developed benchmark framework. Finally, it contains information on the implementation dynamic of different circular migration policy options that can also been applied in the context of the "refugee crisis".

2. Intended audience of the research and findings

Along with its academic value, the research can be used by policy makers at the EU, international and national level. It can serve as a background material for the understanding of the meaning of the term of circular migration and the relevant issues that are at stake with regard to the application of such policies. Its bench-

20 Global Compact for Safe, Orderly and Regular Migration, Zero Draft, 5 February 2018, p.9 and p. 20, accessed on 5 May 2018 at https://refugeesmigrants.un.org/sites/default/files/180205_gcm_zero_draft_final.pdf.

21 European Commission, Evaluation and Fitness Check Roadmap for REFIT - Legal Migration Fitness Check, 1 September 2016, p. 8.

mark framework can be used by policy makers to assess national instruments in different countries. Finally, international organisations and NGOs can use its findings to continue to advocate for a rights-based approach to circular migration.

3. Innovative aspects of the research

The innovative aspects of the research lie in the focus on implementation of EU's approach to circular migration, the plurality of methods used and the case study selection. This PhD research fills a gap in the academic and policy literature by providing a comprehensive picture of the formation and implementation of the EU's circular migration approach that has developed on the basis of both EU and national instruments, which was missing hitherto. Furthermore, by applying legal empirical research methods, such as interviews and focus groups, it draws conclusions about policy outcomes from the implementation of the various migration instruments falling under the circular migration umbrella. It shows the consequences for the rights of migrant workers as a result of the application of different policy options.

Last but not least, an innovative feature of this study is its focus on Central and Eastern Europe. This region is understudied both in terms of issues related to the legislation and policy of these new countries of immigration, as well as in terms of implementation of the EU's circular migration at the national level. Furthermore, the CEE currently comprises both EU and non-EU countries and is characterised by increasing cross-border migration, especially after the latest EU enlargement.

4. Output, outreach and dissemination of research findings

The findings of the research have already been disseminated and discussed at various occasions, both in front of policy and academic audiences. Parts of the research and its findings have been presented before relevant policy makers, such as representatives of the International Centre for Migration and Policy Development (ICMPD) in Vienna, as well as at the Danish Institute for Human Rights in Copenhagen. Furthermore, the gathered empirical data, some of the research results, as well as the developed analytical (benchmark) framework have been used in the study for the Directorial General for Parliamentary Research Services of the European Parliament "The Cost of Non-Europe in the Area of Legal Migration".

Different parts of the research have also been presented in academic forums, including at the Centre for Migration Research at the Warsaw University, at the Centre for Migration Law, Radboud University Nijmegen, at the University of Neuchatel, Switzerland, at the Ius Commune Master Class at the University of Amsterdam and KU Leuven, at the Annual IMISCOE conference, which took place in Rotterdam in 2017, and at several occasions at Maastricht University, e.g., the MACIMIDE Workshop on Citizenship, Migration and Development and 'The World of Interdisciplinary Research' Conference. Some of the research findings were also part of the final TRANSMIC conference at the European University Institute (EUI) in Florence. Parts of the research have also been published or have been submitted for publication (see the bibliography).

In February 2017, the candidate co-organised a workshop on the External Dimension of EU Social Security Coordination in cooperation with the University of Antwerp as part of the TRANSMIC project. The workshop featured the presentation of some of the research findings in front of senior academics working in this field, as well as policy makers from the EU and national level. The presentation of the research findings of this study in this field became part of a special issue of the *European Journal of Social Security*, which will be published in May 2018.

5. Implementing research valorisation

During the implementation of the PhD project, the author significantly expanded her expert network with both academic and policy contacts. Therefore, in order to further disseminate the research results, policy events will be organised for Bulgarian and Polish policy-makers. The final results will also be presented at an outreach conference as part of the TRANSMIC project. Furthermore, the thesis will be distributed among policy makers at the EU, international and national level, as well as through the author's academic networks. The author also plans to seek funding in order to continue to engage with research on the implementation of the legal migration directives, and more specifically the Seasonal Workers' Directive, the Students' and Researchers' Directive and the recast of the Blue Card Directive. Finally, the consequences of the EU visa liberalisation with Georgia and Ukraine for circular migration patterns in the Eastern neighbourhood is another important topic that requires further research.

Biography

Zvezda holds a BA degree in Public Administration and a MA degree in International Relations from the Sofia University "St. Kliment Ohridski". She was awarded a scholarship by the Danish Agency for International Education (CIRIUS) and specialised in European Studies at the University of Copenhagen (2004-2005). She has written her PhD dissertation on "Circular migration from the Eastern partnership countries to the EU – the rights of migrant workers in Bulgaria and Poland" as part of the TRANSMIC project in the period between 2013 and 2017 under the supervision of prof. dr. H.E.G.S. Schneider and prof. dr. M.P.Vink.

At present, Zvezda Vankova is a researcher at the Department of European and International Law & the Institute for Transnational and Euregional Cross Border Cooperation and Mobility (ITEM). As part of her research position at Maastricht University, she is currently participating in a study "The Cost of Non - Europe in the Area of Legal Migration" for DG EPRS of the European Parliament, as well as a study for the Council of Europe "Human Rights Aspects of Immigrants and Refugees' Integration Policies".

Prior to that, Ms Vankova worked as a Central Research Coordinator of the latest edition of the Migrant Integration Policy Index (2015) and as a Policy Analyst at the Migration Policy Group in Brussels. As a Researcher and Program Coordinator at the Law Programme of the Open Society Institute Sofia, Zvezda Vankova was an active participant in the development of Bulgarian immigration and integration policy through policy and legal analyses, advocacy work and capacity-building activities. Zvezda contributed to the drafting of strategic documents such as the National Strategy for Migration, Asylum and Integration, legislative and policy mechanisms in the field of regular and irregular migration. She developed and delivered training courses on integration policies to hundreds of local authority staff and civil society representatives.

Zvezda was selected by UNHCR Bulgaria to monitor the National Program for Integration of Refugees in Bulgaria as an independent expert in the period 2012-2014 and served as the Country Co-coordinator for the European Web Site on Inte-

gration for Bulgaria. She also conducted an independent monitoring report into immigration detention facilities in Bulgaria. At the end of 2012, she co-founded the association Multi Kulti Collective which aims to support the integration of foreigners into Bulgarian society.